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In The Supreme Court Of The United States

October Term, 1987

LAURA REAGIN,

Petitioner

v.

CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a/ Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Circuit's ruling is inconsistent with Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 68 S.Ct. 140 (1947).

2. Whether it is proper to apply a state or federal test for sufficiency of the evidence to support a jury verdict where federal jurisdiction is based on diversity of citizenship, being the "important question" specifically left open in Dick v. New York Life Ins. Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959), and a question on which the circuit courts of appeal are sharply divided.

3. Whether, assuming a federal test of evidentiary sufficiency was proper, there is any rational ground for distinguishing diversity cases from this Court's decisions under FELA.

4. Whether the Court of Appeals, in (a) ignoring an entire segment of plaintiff's appeal, and (b) adopting without legal analysis the District Court's findings on JNOV, and (c) applying the substantive law of a state other than the forum state, so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to this proceeding.

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LAURA REAGIN,
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CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually, and d/b/a/ Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Laura Reagin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding August 26, 1987, rehearing denied October 7, 1987.

OPINIONS BELOW

The opinions of the U. S. District Court for the Middle District of North Carolina and of the Fourth Circuit Court of Appeals are unreported. Those opinions and orders thereon are set forth in the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on August 26, 1987. The petition for rehearing was filed on September 9, 1987, and denied October 7, 1987. Final judgment was entered on October 7, 1987. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitution Amendment VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

U. S. Constitution Amendment V:

No person shall ... be deprived of life, liberty, or property, without due process of law ....

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (c) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

Rule 50(b) of the Federal Rules of Civil Procedure:

(b) Motion for Judgment Notwithstanding the Verdict.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with his motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

I. STATEMENT OF THE CASE

A. Resume of Facts

Reference herein to the Appendix in the Court below will be cited as (R ___). References to the Appendix in this Court will be cited as (A ___).

Plaintiff Laura Reagin was brutally raped, then kidnapped, in the early morning hours of June 17, 1982, at an isolated service station bearing Shell Oil Company insignia near Greensboro, N.C. She filed a complaint in the United States District Court for the Middle District of North Carolina, asserting diversity jurisdiction under 28 U.S.C. § 1332, and alleging that the station owners, Charles and Troy Terry, and the station attendant, Edward C. Brasington, were negligent in the supervision, maintenance and safeguarding of the premises, and that the defendants Shell Oil Company and

Quality Oil Company were liable upon principles of actual or apparent authority. Before trial, the District Court dismissed the action against the station attendant Brasington upon his motion for summary judgment and at trial dismissed the action against the Quality Oil Company defendants at the close of all the evidence. A jury composed of four men and two women returned a verdict of $450,000 in damages against the station owners and against Shell Oil Company. The District Court, however, granted judgment notwithstanding the verdict under Rule 50(b) for all defendants. The Court of Appeals for the Fourth Circuit affirmed and denied plaintiff's timely petition for rehearing and suggestion for hearing en banc.

The facts, stated in the light most favorable to the plaintiff as

required for decision under Rule 50(b), are as follows: At 3:30 a.m. on June 17, 1982, plaintiff Laura Reagin, a 24 year old female traveling from Atlanta to New Jersey on Interstate I-85 near Greensboro, N.C., stopped at the isolated Mt. Hope Shell Service Station which had attracted her by its Shell sign above the highway. Plaintiff was influenced to stop by previous Shell advertising which depicted its stations as safe, clean places to stop.

The station was staffed only by Edward Brasington, the partially-crippled father-in-law of the Terry defendants. Brasington's physical and mental condition was such that he was not permitted to perform even minor repair work at the station and his limitations were noticeable after only brief observation. (R 437, 496). Brasington carried in his pants pocket

a small pistol given him by owner Troy Terry. (R 624-5, 736). Brasington carried the pistol because, admittedly, he was afraid and, as he said, "You don't never know what's coming in there on you." (R 623, 626).

Because visibility into the station was blocked by window displays, plaintiff walked into the station unaware that at that moment a robbery was in progress by an assailant who had been allowed by Brasington to loiter on the premises for 45 minutes to an hour prior to the time the robbery began. As the plaintiff entered the station she saw Brasington standing to her left in front of another man and, noticing nothing unusual, proceeded to the ladies room. When she emerged a few moments later she observed over tops of the blocked windows the heads of the two men walking to the left of the

station, so she turned her back and waited at the cash register to pay for food items she had selected. (R 333-4). The cash register was directly in front of the entrance to the station. The man returned to the station, stuck Brasington's pistol in plaintiff's back, emptied her pockets, and took her at the point of Brasington's pistol to the side of the station where a pole light was extinguished. There he brutally raped plaintiff. (R 334-5, 344). The area under the pole light where the rape occurred would have been visible from Mt. Hope Church Road in front of the station if the pole light had been operating. (R 346).

Brasington made no effort to call for assistance during the rape, but watched it occur from a position 75 to 100 feet away in an adjacent field. (R 336-7, 341, Exh. 3). The rape took

half an hour or more to accomplish. After it was completed, shortly after 4:00 a.m., the assailant drove Reagin's car over 40 miles to Durham, N.C., requiring her to accompany him in the right front seat. At Durham, the assailant released Reagin and her car. With the help of a police officer, she managed to get to Duke Hospital where she was treated for shock and virtually non-existent blood pressure due to the loss of blood from a tear in her vagina. Plaintiff continues to suffer severe emotional and psychological damage caused by the rape. Neither Court below questioned the reasonableness of the jury award, and defendants did not appeal as to the amount thereof.

The assailant--one Lorenzo Woodward who was apprehended by Durham police the next day--had arrived at the

station on foot 45 minutes to an hour before plaintiff, telling Brasington that his automobile was disabled on Interstate I-85. However, Woodward refused Brasington's offer to call for a wrecker, saying he would call his own wrecker. (R 593, 608-10). He said he was driving from California to Florida--thus a stranger to the area--but he asked for no suggestions and did not say whom he might call for assistance. At the time there was in the cash register over $500 and an amount in excess of $100 on the person of Brasington.

Subsequently, when a doughnut route salesman arrived on his regular rounds at the station, Woodward immediately disappeared into the restroom. He came out a few moments later but, seeing the salesman still present, quickly ducked back inside.

Although Woodward's reasons for "hanging around" (Brasington's words) the station were obviously suspicious or non-existent Brasington did not use the opportunity when Woodward was in the restroom to call the Sheriff's deputies and ask them to come by, even though it was his practice to call them two or three times per week when suspicious characters were around.

When Woodward emerged from the restroom a third time he found the salesman gone and Brasington sitting with a cup of coffee facing away from the restroom door. Woodward approached Brasington from behind and, according to the testimony of Brasington, stuck what Brasington claimed was a sawed-off shotgun or rifle in his ribs, announced he was robbing the station, and immediately took Brasington's pistol from his pocket. It was at about this

time that the plaintiff arrived on the premises. (R 611, 615-17).

While plaintiff was in the ladies room the assailant used Brasington's pistol to escort the attendant to the darkness at the side of the station where the light was out and ordered him off into a field. (R 599). When she emerged from the restroom Reagin saw the two men cross a portion of the station front but did not see the gun in Brasington's back because display racks and advertisements blocked the windows and allowed her to observe only the heads of the men. (R 334-5, 354). It was Brasington's pistol the assailant then used to hold on Reagin during the rape. Brasington testified that after the sawed-off weapon was stuck in his ribs he never saw it again. Plaintiff's testimony was to seeing the pistol; the sawed-off

weapon, if it existed, was never located by law enforcement officers despite searches therefor.

The station had twice previously been the subject of armed robbery. One such incident resulted in the serious maiming and permanent injury of the third shift attendant. Homes and other businesses in the vicinity had been victims of criminal activity. (R 429-30, 675). Brasington testified that he regularly called the Guilford County Sheriff's Department two to three times a week because of suspicious activity in the area. (R 626). Despite Brasington's admitted fear, the station had no security devices, unless the illegal carrying of a concealed weapon by Brasington and a direct dial phone line to the Sheriff's Department be considered such. Security training, offered by Shell,

had not been utilized. (R 626, 637).[1]

At trial, plaintiff offered testimony from Mark Campbell, an owner of several service stations, and former owner of the Mt. Hope Shell station. Campbell provided testimony useful to the Court and jury on appropriate standards of care and proximate cause, including the importance to safety of a second person on the premises (R 467), of good lighting (R 460, 486), of his instructions to night attendants to let no one get in behind them (R 472), of the avoidance of loiterers on the premises (R 467, 477), and of the importance to security of requiring clear visibility both into and out of the station (R 461).[2]

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[1]The station is now closed during the nighttime hours in the wake of another armed robbery in 1985.

[2]Even without Campbell's testimony the jury was competent to decide the case because there is nothing in the

B. Discussion of Rulings by the Courts Below.

In his opinion granting judgment notwithstanding the verdict the District Judge, while holding there was "just enough" evidence to permit the jury to find that the criminal act of Woodward was foreseeable, nevertheless granted JNOV for the defendants solely on the ground that, because Woodward was an experienced criminal, reasonable security measures--inferred by the Judge from the facts before the Court to be uncluttered windows, a second station attendant, and adequate lighting--would not have deterred the attack. Thus his decision was bottomed

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case which is "so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the parties was reasonable." Butler v. Acme Market, Inc., 89 N.J. 270, 445 A.2d 1141 (1982). See Fitzgerald v. Manning, 679 F.2d 341, 350 (4th Cir. 1982) (jurors can act on "common knowledge").

solely on an absence of proximate cause. It cannot be said that defendants' conduct "actually caused" plaintiff's injuries, he said. (A 24).

The District Judge reasoned that the blocked windows were not a cause, since plaintiff noticed nothing untoward when she stepped in the front door. (A 21). Here the Court ignored the fact that from the station door the view of the assailant's back blocked a view of the pistol. From the station front she would have had a side view of the occurrence. The Court further reasoned that the extinguished light did not cause the injury because the assailant could have taken the plaintiff out into the darkened field to accomplish his purpose. (A 22). But would he have done so? It was a rainy, muddy night. For the Third Circuit the fact that an assailant had

dragged his rape victim to a darkened area supplied all the proof needed on proximate cause. Kenny v. Southeastern Pennsylvania Transportation Authority, 581 F.2d 351 (3d Cir. 1978), cert. denied 439 U.S. 1073, 59 L.Ed.2d 39, 99 S.Ct.845 (1979). Moreover, and as Mark Campbell testified, it is generally accepted that neat, well lighted premises constitute a deterrent to criminal activity generally. Finally, the District Court reasoned that because the assailant was an "experienced criminal" who was determined to "rob something," it was "sheer speculation" to find that a second attendant would have deterred him. (A 23). This ruling ignored the common sense adage as to safety in numbers, the testimony from Mark Campbell as to the greater safety to the public afforded by an additional

person, and the very important circumstantial evidence that so long as there was a second person on the premises the assailant remained hidden in the restroom, biding his time for when Brasington would be alone. It also ignored the fact that Brasington's crippled condition made him an obvious easy mark for violent crime.

The District Judge's opinion mentioned, in a footnote, plaintiff's contentions that it was also negligence for the station operators to have an incompetent night attendant on duty and to arm him with a pistol, and for the attendant to have allowed the assailant to loiter in the station prior to the robbery. But the Court did not deal with these contentions at all, except to say that the Court had already instructed the jury that they could not find the action or inaction of the

attendant was negligence, "since he had no time or duty to act because he could not do so without risk to his own safety." The Court further stated, in expiation of Brasington, "The evidence also indicated that the assailant 'got the drop' on the attendant from behind with a sawed-off shotgun or rifle, and then disarmed him." (A 20, fn. 1).

Obviously, this discussion by the District Court did not meet the issues, but it seems, in fact, to be a holding that it was not negligence, and thus not a violation of duty, for the station to be staffed by an incapable attendant, for him to carry a pistol in violation of North Carolina law, which was used by the assailant, for him to allow a loiterer to remain on the premises, and for him to carelessly allow the loiterer to "get the drop on

him" in the first place. It appears that the District Court may have believed his ruling granting summary judgment to the attendant Brasington precluded plaintiff's recovery for any of the foregoing reasons. In any event, it is clear that the District Court's ruling on these issues did not turn on proximate cause, but on an absence of duty.

In fact, these were vital issues. Carrying a concealed weapon is illegal in North Carolina and should be negligence per se, since the statutory prohibition is for the safety of the public. State v. Bridgers, 169 N.C. 309, 310, 84 S.E. 689 (1915); State v. Gainey, 273 N.C. 620, 160 S.E.2d 685, 686 (1968); Bell v. Page, 271 N.C. 396, 156 S.E.2d 711, 715 (1967). The jury had a right to infer that the assailant had no other weapon than

Brasington's pistol with which he assaulted her, since none was ever found or seen again by anyone, including Brasington. Further, allowance of loitering is frequently held to be negligence. Wesley v. Greyhound Lines, Inc., 47 N.C.App. 680, 700, 268 S.E.2d 855, 867 (1980) (loiterers in bus station); Peters v. Holiday Inns, Inc., 89 Wis.2d 115, 278 N.W.2d 208 (1979) (assailant in lobby, not to rent a room but looking for a motel employee at 3:00 a.m., was a suspicious circumstance requiring motel staff to monitor his whereabouts). And to hold that because the "assailant got the drop" on the attendant excuses anything the assailant did before or after the assailant "got the drop" is not only illogical it begs the question whether the attendant was negligent in the first place in letting the

assailant get in position to "get the drop." Clearly he was so negligent. See Harris v. Pizza Hut, 445 So.2d 1364 (La. 1984) (security guard held negligent where he sat eating).

Plaintiff appealed the District Court's rulings on JNOV and summary judgment to the Fourth Circuit Court of Appeals. In a per curiam opinion, that Court affirmed the District Court's ruling that "it was mere speculation for the jury to find the alleged breaches were the cause of Reagin's injuries." (Emphasis supplied). Except for one incursion into legal discussion set forth in its footnote 2, in which the Court of Appeals stated that Reagin's claim of negligence in having merchandise racks blocking her view into the station was without foundation,[3] the Court of Appeals

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[3]In its analysis of this evidence, the Court of Appeals completely

engaged in no analysis of the case, but in effect adopted the reasoning of the District Court, and affirmed, citing Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-42 (4th Cir. 1982), an age discrimination case, solely on grounds of lack of causation. (A 55; 54, fn. 2).

The Court of Appeals, having agreed with the District Court that there was an absence of causation, held that the remaining issues raised on appeal are "mooted by the affirmance of the district court's decision." Here

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overlooked the testimony of former station owner, Mark Campbell, who testified unequivocally that for security reasons he always required clear visibility both into and out of the station. (A 461). The fact that Campbell's security reasons were not necessarily for the prevention of rape is, of course, immaterial. Plaintiff need not prove the defendant should have foreseen the crime in the exact form in which it occurred. Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 642, 281 S.E.2d 36,40 (1981).

the Court of Appeals obviously overlooked the issues previously discussed which the District Court had handled on the basis of no negligence, or lack of duty, rather than lack of causation.[4] These issues could not be moot, nor could the grant of summary judgment for Brasington be moot, on the basis of lack of causation. They were not decided on that basis by the District Court, but to the extent they were decided at all, they were decided

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[4]The District Court granted summary judgment for Brasington before trial solely on the ground that he had no duty to act once the assault began because he could not do so with safety for himself, ignoring the other grounds of liability as to Brasington previously discussed. This ruling was not supported by the facts, in view of the availability of a telephone in a nearly darkened station, nor by the law, Boles v. La Quinta Motor Inns, 680 F.2d 1077 (5th Cir. 1982), especially since Brasington created by his earlier negligence the situation which placed plaintiff in jeopardy. Parrish v. Atlantic Coastline Railway Co., 221 N.C. 292, 20 S.E.2d 299, 304 (1942).

on the basis that they did not constitute negligence, which was clearly erroneous. Plaintiff pointed out these matters to the Court of Appeals in a petition for rehearing, but the petition was denied without opinion. (A 56-7).

II. REASONS THE WRIT SHOULD BE ALLOWED

A. Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 68 S.Ct. 140 (1947) is Authority for Summary Reversal of the Case.

In Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, (1947), the plaintiff was a young woman working as a telegraph operator at night in a one room frame building in an isolated part of railroad yards where dangerous characters were known to frequent. There were men operating trains in the yards, who called for messages at irregular intervals during the night, and who because of the absence of any window on the side of the building in

which the door was placed could not be identified by the plaintiff when they knocked. As a result plaintiff responded to a knock, thinking that a trainman was seeking admission, and before she could close it a man entered and beat her with a large piece of iron, seriously and permanently injuring her. The assailant was not an employee of the respondent and the attack was criminal. The District Court dismissed the complaint for failure to state a cause of action and entered summary judgment and the Sixth Circuit Court of Appeals affirmed without opinion. The District Court stated, in explanation of its action, that there was no causation between the injury and respondent's failure to light or guard the premises, and that the law does not permit recovery for intentional or criminal acts. In a per

curiam opinion this Court reversed, saying:

> We are of the opinion that the allegations in the complaint, if supported by evidence, will warrant submission to a jury. Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence.

The parallels between the Lillie case and the case before this Court are obvious. The danger to patrons of the Mt. Hope Shell Service Station was not only foreseeable, it was foreseen, as evidenced by Brasington's fear, his bearing of a pistol, and his frequent calls to the Sheriff's Department, and the District Court specifically found

evidence of foreseeability. At issue here, as in Lillie, is whether there was a causal connection between inadequate lighting and inadequate personnel and plaintiff's injuries.[5] If federal law applies here to evidentiary sufficiency, as the Courts below held, the Lillie case should control the present case. If it be contended that Lillie was decided under the FELA statute, as it was, that fact is immaterial. The discussion by the Court in Lillie was related to common law negligence and proximate cause, not to statutory provisions. As we discuss in Subsection C , infra,

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[5]The reference in Lillie was to the failure to "guard the premises," whereas the discussion in the District Court below was related to an additional attendant. The difference, if any, is immaterial. Defendants obviously recognized the need for a guard. Otherwise why did they furnish Brasington a pistol? He was clearly an inadequate guard, as plaintiff contended.

this Court has cited FELA cases as applicable in diversity actions. Nor is it important that Lillie came up on the pleadings from summary judgment. The facts in this case easily rise to the level of proof alleged in Lillie and this Court's recognition that it could not rule out proximate cause as a matter of law there is equally applicable here.

On the basis of Lillie alone it is respectfully submitted that this Court should reverse the findings of the Fourth Circuit, as it did recently in Anderson v. City of Bessemer City, 470 U.S. 564, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985).

B. This Court Should Resolve the Conflict In the Circuits as to Whether State or Federal Law Applies as to Evidentiary Sufficiency.

1. The Issue is Very Important to the Administration of Justice.

The importance of the issue to whether the sufficiency of evidence in a diversity case to create a jury question is governed by state or federal law is easily demonstrated by the fact that 63,672 diversity cases were filed in 1986 alone.[6] The circuit courts of appeal are hopelessly divided on the question. Cases within the individual circuits are inconsistent. See the discussion in Denneny v. Siegel, 407 F.2d 433, 437-39 (3d Cir. 1969), candidly stating that because of the uncertainty as to which law applies "our decisions have displayed aberrant tendencies." 407 F.2d at 439.

Because of the differing views within the individual circuits it is sometimes difficult to determine which

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[6]The Annual Report of the Director of the Administrative Office of the United States Court 1986, Table C-2, p. 175.

circuits hold that state law applies and which hold that federal law applies. According to an annotation in 10 A.L.R.Fed. 451 the cases from the Fourth, Fifth, Seventh, Ninth, and Tenth Circuits seem to hold that federal law applies, while cases from the Sixth and Eighth Circuits apply state law to determine the sufficiency of the evidence to go to the jury. The Second and Third Circuit cases, according to that annotation, reflect conflicting views. A prominent commentator points out that several of the courts of appeal have declared "that the question is still open," citing cases from the First, Third, Sixth and Eighth Circuits. The 1987 supplement by that commentator, however, cites cases from the Fifth and Tenth Circuits, indicating that the federal test controls, and cases from

the Sixth and Seventh Circuits indicating that the test is to be decided pursuant to state law. See 9 Wright & Miller, Federal Practice & Procedure, § 2525, pp. 548-54 (2d Ed. 1971) (1987 Supp.). A partial compilation by counsel of the positions of the various courts of appeal appears in the Appendix at page 81.

The division between the circuit courts of appeal arises because this Court has never decided the question and, in at least two cases, has expressly left the matter open. Before discussing the cases in this Court it should be pointed out that there is no question but that state law must be resorted to in determining the substantive elements necessary to create rights and duties in a diversity action. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct.

817 (1938). The present question goes to the degree of proof required to establish the rights and duties under state law. See 9 Wright & Miller, Federal Practice & Procedure, supra, at 551. Furthermore, the present question is not involved in the law regarding a division of functions between judge and jury, as was the case in Byrd v. Blue Ridge Rural Elec. Coop. Co., Inc., 356 U.S. 525, 2 L.Ed.2d 953, 78 S.Ct. 893 (1958).

In Byrd, supra, this Court referred to Stoner v. New York Life Ins. Co., 311 U.S. 464, 85 L.Ed. 284, 61 S.Ct. 336 (1940), a non-jury action regarding conflicts between state and federal rulings involving the same parties, as having "held that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the

state-created right was established." Byrd, 356 U.S. 525, 540, n. 15, 2 L.Ed.2d at 964, n. 15, 78 S.Ct. at 902, n. 15. But a year later in 1959 this Court, in Dick v. New York Life Ins. Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959) said:

> Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement .... But the question is not properly here for decision .... Under these circumstances, we will not reach out to decide this important question particularly where, in the context of this case, the two standards are substantially the same. A decision as to which standard should be applied can well be left to another case where the question is briefed and argued. 359 U.S. at 444-45, 79 S.Ct. at 926, 3 L.Ed.2d at 941.

In 1964, this Court granted certiorari specifically to determine the question but refrained from deciding the question when it found

that "the evidence was sufficient under any standard which might be appropriate--state or federal." Mercer v. Theriot, 377 U.S. 152, 156, 12 L.Ed.2d 206, 84 S.Ct. 1157, 1160 (1964).

Manifestly, this is a question which needs a definitive ruling from this Court. We respectfully submit that it is a question even more basic than that believed to be extremely certworthy by Justice White in Venture Technology, Inc. v. McDaniel Fuel Gas Distribution Corp., 459 U.S. 1007, 74 L.Ed.2d 398, 103 S.Ct. 362 (1982), involving the evidence to be considered on JNOV motions in anti-trust cases.

2. The Federal Standard of Evidentiary Sufficiency Applied by the Courts Below Deprived Plaintiff of a Recovery She Would Have Had Under State Law.

The District Court held that in a diversity case sufficiency of the

evidence to create a jury question is governed by federal law. (A 9). The Court of Appeals affirmed, citing a Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-2 (4th Cir. 1982), a case which attempted to articulate federal standards on causation to the effect that the inferences drawn by the jury must be reasonably probable; mere speculation is insufficient. (A 55). Counsel for petitioner, in her petition to the Court of Appeals for rehearing, pointed out that these rulings, assuming they accurately stated federal law as applied to this case, placed a substantially greater burden as to the sufficiency of the evidence on causation than does the state law of North Carolina. Petitioner pointed out that when the Fourth Circuit in Wratchford v. S. J. Groves & Sons, Inc., 405 F.2d 1061 (4th Cir. 1969),

confirmed the rule that a federal standard applies to the question whether evidence is sufficient for a case to go to the jury the opinion had as its expressed purpose the protection of a litigant's right to jury trial under the Seventh Amendment, in the face of a more restrictive state rule under Maryland law which would have precluded submission of the case to the jury. Wratchford was correct in this. The Seventh Amendment should control "where to follow the state rule would deprive the party of the verdict of a jury under circumstances where, at common law, he would have been entitled to go to the jury." 9 Wright & Miller, Federal Practice and Procedure, § 2525, p. 548 (2d Ed. 1971). See the dissenting opinion of now Chief Justice Rehnquist that "[t]he right of trial by jury thus preserved [by the

Seventh Amendment] is the right which existed at English common law when the amendment was adopted." Parklane Hosiery v. Shore, 439 U.S. 322, 344, 58 L.Ed.2d 552, 570, 99 S.Ct. 645 (1979), quoting Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657, 79 L.Ed. 1636, 55 S.Ct. 890 (1935),

But with the ruling in this case, and the rulings in other recent cases, the Fourth Circuit now seems to use the rule that federal law governs the question as to the sufficiency of evidence to restrict state common law rules on the right to jury trial rather than to protect those Seventh Amendment rights, as was the purpose of Wratchford. There must be what the Fourth Circuit calls interchangeably "reasonable probability," or "substantial probability," for a jury to find causation. Lovelace v.

Sherwin-Williams Co., 681 F.2d 230, 242 (1982). Moreover, there must be "substantial evidence" of causation to warrant submission of the question to a jury. Millers Mutual Insurance Association v. Southern Railway, 483 F.2d 1044 (4th Cir. 1973). More recently the Fourth Circuit seems to have embraced an even stricter rule and now requires that a plaintiff must show that his injury was "more likely than not" caused by the action of the defendant. See Owens by Owens v. Bourns, Inc., 766 F.2d 145, 149-50 (4th Cir. 1985) cert. denied 106 S.Ct. 608 (1986); Fitzgerald v. Manning, 679 F.2d 341, 349 (1982); Ralston Purina v. Edmunds, 241 F.2d 164, (4th Cir. 1957), cert. denied 353 U.S. 974, 1 L.Ed.2d 1136, 77 S.Ct. 1059 (1957). See Note, Sufficiency of Causation Evidence

to Warrant Submission of the Case to the Jury. 21 Wake Forest L.Rev. 1155 (1986). The District Court was advertent to this stricter requirement, citing both Owens and Ralston Purina in support of his decision.

The "more likely than not" requirement is directly at odds with the earlier ruling by the Fourth Circuit in Wratchford, supra, and certainly with the mandate of this Court in such cases as Lavender v. Kurn, 327 U.S. 645, 90 L.Ed. 916, 66 S.Ct. 740 (1947). Noting that Lavender has been accepted as "establishing the standard for use in diversity cases," Wratchford explicitly disavowed the concept that a jury should not be allowed to draw any inference from circumstantial evidence, if the one is as probable as the other, and stated

that it is the province of the jury to resolve conflicting inferences from circumstantial evidence. Wratchford v. S. J. Groves & Sons, Inc., 405 F.2d at 1066.

The truth is that "any attempt to suggest mathematical precision in the weighing of probabilities is spurious; rarely does the court have any way of knowing what the mathematical probabilities are." Wright & Miller, Federal Practice & Procedure § 2528, pp. 565-66 (2d Ed. 1971). A case may not be taken from the jury merely because "a measure of speculation and conjecture is required." Lavender v. Kurn, supra, 327 U.S. at 653, 90 L.Ed. at 923, 66 S.Ct. at 744. Thus, unless reasonable minds could not differ it is for the jury to determine what weight is to be given any inference. To substantially the same

effect see Justice White's opinion in the anti-trust case of Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-01, 8 L.Ed.2d 777, 82 S.Ct. 1404 (1962).

There can be no doubt in this case that under North Carolina law the question of causation was for the jury. There are several reasons for this. In the first place the District Court and the Court of Appeals misstated the North Carolina substantive law on causation.[7] Both the District Court and the Court of Appeals viewed the question to be whether the negligence of the defendants was "the cause of

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[7]It is uniformly agreed that Erie R.R. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938) requires the application of state substantive law in diversity cases. It should not, therefore, be arguable that if the District Court and the Court of Appeals did not properly apply state substantive law error has occurred.

Reagin's injuries."[8] Manifestly, this is not the test for proximate causation in North Carolina. The defendants' negligence need not be the underlying proximate cause; it is sufficient if it is only a proximate cause of an injury. Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 311 S.E.2d 559, 565-66 (1984). Plaintiff needed only to establish that "any degree, however small" of her injuries were due to the defendants' negligence. Rattley v. Powell, 223 N.C. 134, 136, 25 S.E.2d 448, 450 (1943) (Emphasis supplied).

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[8]See the Court of Appeals opinion. (A 53-4). The District Court phrased his ruling thusly: "It cannot be said on the basis of evidence presented at trial that Defendants' conduct actually caused Plaintiff's injuries as a matter of fact; neither can it be said that those injuries would not have been sustained without Defendants' conduct or failure to act." This is language of sole proximate cause. See Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 506, 1 L.Ed.2d 493, 499, 77 S.Ct. 443 (1957).

In Price v. Gray, 246 N.C. 162, 166, 97 S.E.2d 844 (1957) the Supreme Court of North Carolina expressly rejected that plaintiff would have to prove the proximate cause because of the undue burden this would entail. Rather, "the negligence of each party was a proximate cause; the negligence of neither was the proximate cause." 246 N.C. 162, 168, 97 S.E.2d 844, 849 (1957).

In the second place, and most importantly, under North Carolina law, and the common law generally, the test of whether harm to a plaintiff is foreseeable is the test for proximate cause. "The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of defendant." Williams v. Carolina Power & Light Co.,

296 N.C. 400, 250 S.E.2d 255, 258 (1979). (Emphasis supplied).

In Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 311 S.E.2d 559, 566-67 (1984) the Supreme Court of North Carolina said:

> It is only when the facts are all admitted and only one inference may be drawn from them that the Court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case .... Hence, what is the proximate cause of an injury is ordinarily a question for the jury. [Citations omitted] [Emphasis supplied].
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> * * * * *
>
> The well settled rule in this jurisdiction is that excepting cases so clear that there can be no two opinions among men of fair minds, the question should be left for the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act. [Citations omitted] [Emphasis supplied].

Notably, North Carolina cases which have found criminal acts foreseeable have also found sufficient evidence of causation. Wesley v. Greyhound Lines, 47 N.C.App. 680, 268 S.E.2d 855, 867 (1980); Urbano v. Days Inn of America, Inc., 58 N.C.App. 795, 295 S.E.2d 240, 242 (1982). Here, the District Court found plaintiff's injury to be foreseeable and the Court of Appeals did not disagree. The subsequent finding by those Courts that "it was mere speculation for the jury to find the alleged breaches were the cause of Reagin's injuries" is basically inconsistent with the finding by the District Court of foreseeability and reveals a lack of recognition that this type case is nearly always based on circumstantial evidence. An example from Professor Prosser is instructive. "When a

child is drowned in a swimming pool, no one can say with certainty that a lifeguard would have saved the child; but the experience of the community permits the conclusion that the absence of the guard played a significant part in the drowning. Such questions are peculiarly for the jury ...." Prosser & Keeton, The Law of Torts, p. 270 (5th Ed. 1970). Earlier cases in the Fourth Circuit recognize, as did Lavender v. Kurn, supra, that some measure of speculation and conjecture are necessarily always present in this type of case. Harner v. John McShane, Inc., 394 F.2d 480, 482 (4th Cir. 1968).

Also implicit in both lower court decisions is the belief that the criminal act broke the causal chain. The District Court stated, "[t]he evidence is uncontradicted that the

assailant was an experienced criminal, just a few days out of prison who determined ... to 'rob something.'" (A 24-5). The Court of Appeals described the case as one "alleging responsibility for the criminal acts of [the assailant]." (A 52). These statements miss the point. It is the law in this Court and in North Carolina that it is irrelevant that a third party's act is criminal once foreseeability establishes a duty to safeguard against crime. Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 78, 68 S.Ct. 140 (1947); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36, 40 (1981).

C. This Court Should Clarify Whether its Decision on Evidentiary Sufficiency in FELA and Jones Act Cases Apply in Diversity Cases.

The leading case in this Court on evidentiary sufficiency is Lavender v.

Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1947), in which this Court said:

> It is no answer to say that the jury's verdict involves speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or believe whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might have drawn a contrary inference or feel that another conclusion is more reasonable. (Emphasis supplied). 327 U.S. at 653, 90 L.Ed. at 923, 66, S.Ct. 740.

There are numerous cases involving similar reasoning in this Court, including, for example, Tennant v.

Peoria & Pekin Union Railway, 321 U.S. 29, 88 L.Ed. 520, 64 S.Ct. 409 (1944), Brady v. Southern Railway Co., 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct. 232 (1944), and Bailey v. Central Vermont Railway Co., 319 U.S. 350, 87 L.Ed. 1444, 63 S.Ct. 1062 (1943). These cases were decided under statutes such as the Federal Employers Liability Act and the Jones Act. But there is no good reason to believe that they are not precedent for diversity actions, and in fact this Court has considered them as such. In Dick v. New York Life Ins. Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959), this Court, in footnote 8, cited the Brady and Bailey cases, supra, as setting forth the federal rule of evidentiary sufficiency. Significantly, the Fourth Circuit case of Wratchford v. S. J. Groves & Sons, Inc., 405 F.3d 1061 (1969), which

confirmed the adoption of a federal rule of evidentiary sufficiency cited Lavender v. Kurn, supra, as the federal standard to be applied in diversity cases.

In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, n. 6, 8 L.Ed.2d 777, 782, 82 S.Ct. 1404, 1409, n. 6, (1962) a private anti-trust case, this Court, per Justice White, cited the Tennant case, supra, as indicating the rule on appellate review of a jury verdict. And in per curiam opinions, this Court has reversed judgments of lower courts which had substituted their views on the sufficiency of the evidence for that of the jury in non-FELA or Jones Act cases. See, e.g., Williams v. Carolina Life Ins. Co., 348 U.S. 802, 99 L.Ed. 633, 75 S.Ct. 30 (1954), reversing C.A. 5th, 1954, 210 F.2d 477;

Swafford v. Atlantic Coast Line R. Co., 350 U.S. 807, 100 L.Ed. 725, 76 S.Ct. 80 (1955), reversing C.A. 5th, 1955, 220 F.2d 901; Union Trust Co. v. Eastern Air Lines, Inc., 350 U.S. 907, 100 L.Ed. 796, 76 S.Ct. 192 (1955), reversing C.A. 1955, 221 F.2d 62, 95 U.S.App. D.C. 189; Gibson v. Phillips Petroleum Co., 352 U.S. 874, 1 L.Ed.2d 77, 77 S.Ct. 16 (1956), reversing C.A. 5th, 1956, 232 F.2d 13.

Additional reasons in support of the substantial body of opinion that the decisions by this Court under FELA and the Jones Act state a general rule applicable to all federal jury cases, including the belief that Congress could not constitutionally give a broader role to the jury in these statutory actions than that guaranteed by the Seventh Amendment, are set forth in 9 Wright & Miller, Federal Practice

& Procedure, § 2525, pp. 557-9 (2d Ed. 1971).

Since it is generally assumed that these cases evidence a more restrictive view of the circumstances under which a directed verdict, or JNOV, may be ordered than is now followed in the Fourth and some of the other circuits, it is "extremely important to know whether the decisions are confined to the particular statutory actions in which they have been handed down, or whether they represent a construction of the Seventh Amendment, and thus are controlling in all jury cases in federal courts." 9 Wright & Miller, supra, § 2526, p. 556. "A decision by the Supreme Court, clearly stating which view it takes as to the scope of the FELA and Jones Act decisions, would be of helpful guidance to the lower

federal courts. 9 Wright & Miller, supra, § 2526, p. 559.

We believe that the Fourth Circuit misapplied the federal law of evidentiary sufficiency enunciated in Wratchford and other cases. If it did not, it is clear that the grant of judgment notwithstanding the verdict in this case cannot stand scrutiny under the rules laid down in Lavender v. Kurn, Lillie v. Thompson, and other pronouncements by this Court. And so long as this Court does not, in a current case, state definitively that its pronouncements in such cases as Lavender, Tennant, Brady, and others are the law generally for jury actions tried in the federal courts there will be a tendency for the lower courts to be confused as to when they can substitute their judgments for those of juries. This case conflicts clearly

with other similar cases from other circuits. Doyle v. Exxon, 592 F.2d 44, 48 (2d Cir. 1979) (jury could conclude that criminal events were caused by Exxon's failure to install a cash safe system, which was the only evidence on proximate cause); Kenny v. Southeastern Pennsylvania Transportation Authority, 581 F.2d 351 (3d Cir. 1978), cert. denied 439 U.S. 1073, 59 L.Ed.2d 39, 99 S.Ct. 845 (1979) (fact assailant dragged plaintiff to a darkened area supplied all the proof needed that the extinguished light was proximate cause); Boles v. La Quinta Motor Inns, 680 F.3d 1077 (5th Cir. 1982) (duty to come to aid of patron in distress).

Wright & Miller are clearly correct in suggesting that a decision by this Court on the quantum of proof required would be very helpful.

D. The Treatment of Plaintiff's Appeal Departed From the Accepted and Usual Course of Judicial Proceedings.

We have previously discussed that the Court of Appeals and the District Court ignored vital issues in the case, including questions of negligence relating to the concealed weapon carried by the station attendant,and its use in the rape of plaintiff, questions relating to the negligence of the station operators in staffing the station with an incapable attendant, the attendant's allowance of loitering on the premises, and the negligence of the attendant in allowing the assailant to relieve him of his pistol. Further ignored by the Court of Appeals was plaintiff's appeal from the grant of summary judgment for the attendant, it being plaintiff's contention that the attendant had some duty under the circumstances to do more

than watch her being raped from a position in a field 75 to 100 feet away. See Section I.B., Discussion of Rulings by the Courts Below, fn. 4, supra.

28 U.S.C. § 1291 gives plaintiff, along with all other litigants, a right of appeal from the District Court to the Court of Appeals. In ignoring these very important aspects of plaintiff's appeal the Court of Appeals has, in effect, denied plaintiff her statutory right in this regard and thus Fifth Amendment due process. This is true, if for no other reason than that, assuming arguendo that the Courts below are correct that there was no proximate cause related to blocked windows, an extinguished pole light, or a second attendant, plaintiff still has a right to recovery based on the other acts of

negligence which the Courts below ignored.

Legal questions in this case abound. Yet the Court of Appeals did no more than perfunctorily write a per curiam opinion which dealt with none of the issues involved, and accepted and adopted verbatim the opinion of the District Court. If the right to jury trial is to be protected such casual disposition of appeals from a judgment notwithstanding the verdict should be ruled inadequate. The Fifth Circuit has said as much. In Western Hills Bowling Center, Inc. v. Hartford Fire Ins. Co., 412 F.2d 563, 565 (1969), the Fifth Circuit stated:

> The District Court also entered findings of fact and conclusions of law. Inasmuch as the evidence on a motion for judgment n.o.v. must be viewed by the appellate court in the light most favorable to the non-movant, Boeing Co. v. Shipman, 5th Cir. 1969, 411 F.2d 365, the findings entered by the district court have no place in this court's evaluation of the

sufficiency of the evidence. (Emphasis supplied).

It should be noted also that the Fourth Circuit relied for its decision only on Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (1982), an ADEA case where proximate cause relates to motivation and not at all to common law negligence concepts.

This inadequate and incomplete disposition of plaintiff's appeal, together with the misapplication of the substantive law of the State of North Carolina already discussed, seem so far a departure from the usual and accepted course of judicial proceedings as to call for exercise of this Court's power of supervision.

III. CONCLUSION

Defendants, with national advertising and a Shell Oil Company sign high above I-85, (1) enticed Laura Reagin into a nightmarish trap she

could not anticipate; (2) provided, through a loiterer, a rapist to attack her after she fell into the trap; (3) provided the rapist a weapon to use in accomplishing his purpose; and (4) provided a darkened area on station premises where the rapist could spend 30 minutes unmolested accomplishing his purpose.

Notwithstanding the foregoing, a United States District Judge and three Judges on the United States Court of Appeals have, without bothering to apply written legal reason to most of the issues, overturned a verdict in Miss Reagin's favor by a jury of responsible citizens of North Carolina. Judicial decisions of this sort, while no doubt conceived in good faith, continue the "gradual process of judicial erosion of the essential guarantee of the Seventh Amendment,"

frequently lamented by distinguished members of this Court, including Justice Black in Galloway v. United States, 319 U.S. 372, 397, 87 L.Ed. 458, 63 S.Ct. 1077 (1943) (dissenting opinion), and now Chief Justice Rehnquist, in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339, 58 L.Ed.2d 552, 567, 99 S.Ct. 645 (1979) (dissenting opinion).

Beyond the important questions relating to the trial of cases in the federal courts as already discussed this case also has peculiar substantive significance in view of the interstate travel involved. If businesses located along interstate highways are free to subject their patrons to the kind of danger the non-existent security in this case engendered interstate travel will indeed become very hazardous. And in view of our vast interstate

highway systems the federal courts may well become a principal forum for these types of cases. As Justice Daniel O'Hern, of the New Jersey Supreme Court recently said in a similar case, "If crime reduction is to become anything more than wishful thinking, citizens must care enough to devote energy, money, and--most of all--themselves to the fight for positive results ...." Butler v. Acme Markets, Inc., 89 N.J. 270, 445 A.2d 1141, 1146 (1982), quoting the National Advisory Commission on Criminal Justice Standards and Goals, Community Crime Prevention 196 (1977).

It is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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I, Barbara E. Grove, being first duly sworn, deposes and says: On January 5, 1988, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petition for a Writ of Certiorari and Appendix to and further certify that I mailed this same date the required three copies via first-class mail to the opposing counsel listed below:

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TO WIT:

This day personally appeared before me, a notary public in and for the aforesaid jurisdiction, Barbara E. Grove, who made oath that the statements contained herein are true and accurate to the best of her information, knowledge and belief.

Given under my hand this 5th day of January, 1988.

My Commission expires: June 9, 1991.

Notary

No. 87-1148

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

October Term, 1987

LAURA REAGIN,

Petitioner

v.

CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a/ Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JUDGMENT AND ORDER OF DISTRICT JUDGE ALLOWING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(Filed September 4, 1986)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

LAURA REAGIN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO.
	)	C-84-470-G
CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station;) MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,	)	
	)	
Defendants	)	

JUDGMENT and ORDER

BULLOCK, District Judge

This civil action came on for trial before the court and a jury during the week of July 28, 1986, and the issues having been duly tried and answered by the jury as follows:

1. Was the criminal assault on the Plaintiff reasonably foreseeable by the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership?

Yes
(Yes or No)

2. If the answer to Issue No. 1 is "Yes," did the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership, breach their duty of ordinary care under the circumstances by failing to provide adequate security measures?

Yes
(Yes or No)

3. If the answers to Issues Nos. 1 and 2 are "Yes," was the breach of duty by the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership, a proximate cause of the injuries suffered by plaintiff?

Yes
(Yes or No)

4. Were Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership, agents of the Defendant Shell Oil Company by the existence of apparent authority?

Yes
(Yes or No)

5. If the answers to Issues Nos. 1 and 2 and 3 are "Yes," what amount, if any, of actual and compensatory damages is the Plaintiff entitled to recover?

$450,000.00
(amount)

For the reasons set forth in a memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that the Defendants' motions for judgment notwithstanding the verdict pursuant to Rule 50(b), Fed. R. Civ. P., be, and the same hereby are, GRANTED, and that the jury verdict in favor of the Plaintiff be, and the same hereby is, SET ASIDE; and

IT IS FURTHER ORDERED that the Defendants' alternative motions for new trial pursuant to Rule 59, Fed. R. Civ. P., be, and the same hereby are, DENIED.

September 4, 1986.

/s/Frank W. Bullock, Jr.
United States District Judge

MEMORANDUM OPINION OF DISTRICT JUDGE ALLOWING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(Filed September 4, 1986)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

LAURA REAGIN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO.
	)	C-84-470-G
CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station;	)	
MT. HOPE SHELL SERVICE STATION, a Partnership;	)	
EDWARD C. BRASINGTON;	)	
SHELL OIL COMPANY;	)	
QUALITY OIL COMPANY OF STATESVILLE, INC.; and	)	
QUALITY OIL COMPANY, a Limited Partnership,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

BULLOCK, District Judge

In this diversity action Plaintiff Laura Reagin sought damages for injuries arising from the criminal acts of a third party which occurred on the premises of the Mt. Hope Shell Service Station during the early morning hours of June 17, 1982. In her complaint she alleged that the Mt. Hope Shell Service Station and its owners and operators, Charles Lawrence Terry and Troy Virgil Terry, the Shell Oil Company, Quality Oil Company, and Quality Oil Company of Statesville, Inc., were negligent in the supervision, maintenance, and safeguarding of the premises. The Plaintiff also alleged that the service station attendant Edward C. Brasington

was negligent in several respects. Prior to trial the court granted Brasington's motion for summary judgment. At trial, and at the close of all of the evidence, the court granted the motions of Quality Oil Company and Quality Oil Company of Statesville, Inc., for a directed verdict in their favor.

Issues were submitted and answered by the jury as follows:

1. Was the criminal assault on the Plaintiff reasonably foreseeable by the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership?

Yes
(Yes or No)

2. If the answer to Issue No. 1 is "Yes," did the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnerhsip, breach their duty of ordinary care under the

circumstances by failing to provide adequate security measures?

Yes
(Yes or No)

3. If the answers to Issues Nos. 1 and 2 are "Yes," was the breach of duty by the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnership, a proximate cause of the injuries suffered by plaintiff?

Yes
(Yes or No)

4. Were Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, and the Defendant Mt. Hope Shell Service Station, a partnerhsip, agents of the Defendant Shell Oil Company by the existence of apparent authority?

Yes
(Yes or No)

5. If the answers to Issues Nos. 1 and 2 and 3 are "Yes," what amount, if any, of actual and compensatory damages is the Plaintiff entitled to recover?

$450,000.00
(amount)

Mt. Hope Shell Service Station and its owners and operators, and the Shell Oil Company, have moved for judgment notwithstanding the verdict under Rule 50(b), Fed. R. Civ. P., and, alternatively, for a new trial under Rule 59, Fed. R. Civ. P. The Shell Oil Company also seeks full indemnity from Mt. Hope Shell Service Station and from Quality Oil Company, a limited partnership, for any damages that it may be called upon to pay to the Plaintiff.

Defendants' Motions for Judgment Notwithstanding the Verdict

Even in a diversity case, the sufficiency of the evidence to create a jury question is governed by federal law. Owens by Owens v. Bourns, Inc.,

766 F.2d 145, 149 (4th Cir. 1985), cert. denied, __U.S. __, 106 S.Ct. 608 (1986). The question before the court on the motions by the Defendants for judgment notwithstanding the verdict under Rule 50(b), Fed. R. Civ. P., is whether there is evidence upon which a jury can properly find a verdict. In determining whether the evidence is sufficient, the court is not free to weigh any evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. However, a mere scintilla of evidence is insufficient to sustain a verdict. When a jury is called upon to

determine causation, the inferences it draws to reach its verdict must be reasonably probable; mere speculation is insufficient. Ralston Purina Co. v. Edmunds, 241 F.2d 164, 167 (4th Cir.), cert. denied, 353 U.S. 974 (1957).

With these principles in mind, the court must determine whether the evidence before the jury was sufficient to permit a finding that the criminal attack upon the Plaintiff was not only foreseeable, thus imposing a duty of reasonable care upon the station operators, but also that the operators breached their duty of reasonable care, and that the Plaintiff's injuries were causally related to the breach of duty. It is well established in North Carolina that a store owner is ordinarily not liable for injuries to invitees which result from the

intentional criminal acts of third persons. It is usually held that such acts cannot be reasonably foreseen by the owner, and therefore constitute an independent, intervening cause absolving the owner of liability. Nevertheless, the law recognizes that where circumstances exist which give the owner reason to know that there is a likelihood of conduct on the part of third persons which endanger the safety of his invitees a duty to protect or warn the invitees can be imposed. Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981).

> Since the business operator is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of third persons are occurring or are likely to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety

> of a visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Id. at 639-40, quoting Restatement (Second) of Torts § 344 comment f.

In June 1982, the Mt. Hope Shell Station was open 24 hours a day and was in a relatively isolated area located off Interstate 85 between Greensboro and Burlington. Across from the station was a Texaco station and a restaurant, neither one of which were open late at night. There was also a private residence across from the station. These were the only other buildings in the area. Adjoining the

station was an empty field with a large wooded area behind.

The evidence before the jury was that prior to June 17, 1982, the station had experienced two armed robberies in 1976, and during the December 1976 robbery the station attendant had been shot. In 1974 some tires had been stolen from the station. These were the only criminal acts occurring on the premises. In addition, there had been a break-in at the Texaco station and at a residence in the general area at some unspecified times. The night attendant, Edward Brasington, testified that he carried a pistol for his protection and that he called the Sheriff's Department two or three times a week on the direct line from the station to report suspicious persons and vehicles in the area.

Viewing this evidence most favorably to the Plaintiff, and giving her the benefit of all reasonable inferences from the evidence, including the inference that the past criminal acts were known to the operators of the station in 1982, the court believes that the Plaintiff may have presented just enough evidence to permit the jury to find that it was reasonably foreseeable that criminal acts would occur on the premises which could involve a risk to any invitees present. See Sawyer v. Carter, 71 N.C.App. 556, 561, 322 S.E.2d 813, 817 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 393 (1985) (The North Carolina Court of appeals affirmed summary judgment for defendant in a case involving a convenience-type store where there was less evidence of foreseeability than in

the present case. However, the court said that, although evidence of similar criminal activity committed on the premises is the most probative type of evidence of foreseeability, there is no need to adopt a bright-line rule limiting evidence exclusively to prior crimes on the premises.). See also Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 643, 281 S.E.2d 36, 40 (1981) (Hanes Mall had only one guard for entire parking lot during pre-Christmas shopping season and the mall manager had represented to the public that mall security measures were augmented during that season; 31 incidents had occurred in the parking lot, including 4 or 5 assaults, during the past year. The North Carolina Supreme Court reversed summary judgment for the defendant.); Urbano v. Days Inn

of America, Inc., 58 N.C.App. 795, 798, 295 S.E.2d 240, 242 (1982) (motel's premises were not guarded or patrolled by its own security officers, but instead routine local police visits were relied upon for security, although there were at least 42 episodes of criminal activity on the premises during the three years preceding plaintiff's injury, 12 of which occurred during the immediately preceding three and one-half months; summary judgment for the defendant held to be improper); and Brown v. North Carolina Wesleyan College, 65 N.C.App. 579, 309 S.E.2d 701 (1983) (court's decision upholding summary judgment for defendant turned on foreseeability but the court indicated, based on the forecasts of evidence, that defendant's

security would have been sufficient under the circumstances).

Having resolved the issue of foreseeability in the Plaintiff's favor, the jury was then called upon to determine whether the criminal acts of third persons, which they had found to be reasonably foreseeable, could have been prevented by the exercise of ordinary care. A landowner's duty to use reasonable care to safeguard his business invitees from the criminal acts of third persons arises only if such acts are reasonably foreseeable. The question thus becomes what would be reasonable care under the circumstances, considering the evidence of conditions in the surrounding area, the general character of the neighborhood, the location of the premises, the character of the business

enterprise, and other criminal activity occurring on the premises. Sawyer, 71 N.C.App. at 561, 322 S.E.2d at 817.

The undisputed evidence before the jury was that the Mt. Hope Shell Service Station was staffed during the late evening and early morning hours by one attendant, age fifty-five, who had suffered a slight stroke and who had not been given any emergency training, and that the attendant carried a pistol for protection. The operators of the station had also installed a direct telephone line to the Guilford County Sheriff's Department, which the night attendant used two or three times a week to report suspicious activity in the area. The station was lighted by floodlights at the top of five poles around the station area and also by lights under the eaves of the station.

One of the floodlights at the back area of the station near the empty field was not operating on June 16-17, 1982. The windows of the station were partially obscured by displays, thus hindering vision in and out of the building.

The court is of the opinion that the only facts before the jury from which they could infer a breach of ordinary care by the station operators were the single attendant, the partially-obscured windows, and the inoperable pole light.[1] As to the

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[1]Although the Plaintiff argued that it was negligence for the operators to have a 55-year-old man, who had suffered a slight stroke, on duty at night, and to arm him with a pistol, and for him to have allowed the assailant to loiter in the station prior to the robbery and attack, the court instructed the jury that there was no evidence from which they could find that the action or inaction of the attendant was negligent, since he had no time or duty to act because he could not do so without risk to his own safety. The evidence also indicated that the assailant "got the drop" on

windows, it is highly speculative whether the Plaintiff would have noticed anything out of the ordinary if she could have easily looked through the windows before entering the station, even if she attempted to do so; in any event when she entered the station, she noticed nothing unusual about the two men standing inside and went directly to the restroom. Although the robber assaulted the Plaintiff in the darkened area near the

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the attendant from behind with a sawed-off shotgun or rifle, and then disarmed him. See Higgins v. New Orleans Public Service, Inc., 347 S.2d 944 (La. 1977); Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977); Parrish v. Atlantic Coast Line R. Co., 221 N.C. 292, 20 S.E.2d 299 (1942); see also Reagin v. Terry, slip op. C-84-470-G (M.D.N.C. March 26, 1986) (memorandum opinion by which the court dismissed Brasington as a defendant on his motion for summary judgment, and in which the cases cited above are discussed).

inoperable light pole, he already had her at gunpoint before exiting the station, and could have just as easily walked a few feet more beyond the station into the field or wooded area to carry out his attack. Thus any breach of duty depends substantially on the failure of the station operators to have more than one attendant on duty at night. Plaintiff presented no evidence that additional attendants were the custom at other similarly-situated all-night stations, or that silent alarms, television cameras, or other security devices were used at other locations.[2] In fact, all of the

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[2]Sergeant C. B. Willis of the Guilford County Sheriff's Department, called as a witness by the Plaintiff, testified that he had been assigned to the Mt. Hope Shell Station area for seven years, that the station was well-lighted, and that the Mt. Hope Station was no more susceptible to crime than any other twenty-four hour operation.

evidence before the jury was to the effect that other all-night businesses at the time were customarily staffed by only one attendant. Even if it was a breach of duty for the station operators not to have had a second night attendant, the court believes it would be sheer speculation for the finder of fact to determine either that a second attendant would have deterred the robber, or would have been able to prevent him from carrying out his unlawful acts. Cf. Foster, 303 N.C. 636, and Urbano, 58 N.C.App. 795.

Finally, even if it is assumed that the Plaintiff's evidence was sufficient on both the issues of foreseeability and breach of the duty of reasonable care, there still must be evidence from which the finder of fact could find that the Defendants'

negligence was, as a matter of reasonable probability, causally related to the criminal assault on the Plaintiff both as a cause in fact and a proximate cause of Plaintiff's injuries. It cannot be said on the basis of evidence presented at trial that Defendants' conduct actually caused Plaintiff's injuries as a matter of fact; neither can it be said that those injuries would not have been sustained without Defendants' conduct or failure to act. The evidence is uncontradicted that the assailant was an experienced criminal, just a few days out of prison, who determined while riding along the interstate with friends to "rob something" prior to observing or knowing anything at all about the Mt. Hope Shell Service Station. Again, to determine that the

assailant would have been deterred or thwarted by two attendants, or by additional lighting, is to speculate about mere possibilities, rather than to find reasonable probability. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241 (4th Cir. 1982); Ralston Purina Co. v. Edmunds, supra.

The Plaintiff in this case is an undeniably sympathetic victim of a tragic act for which she is in no way responsible. Indeed, the Plaintiff has made a commendable effort to carry on a normal life following an experience for which no amount of money can fully compensate. However, by insisting on reasonable probability rather than mere possibility to support a jury verdict, the court recognizes its duty not to ignore current legal standards simply

because the Plaintiff presents a sympathetic case.

Defendant Shell Oil also contends that there is insufficient evidence from which the jury could find that the Terrys were agents of Shell by the existence of apparent authority. Despite the absence of an express agency relationship, an agency may be created by manifestations made by the alleged principal to a third person or the public at large, and the reasonable belief by a third person to whom the manifestations are made that the purported agent is authorized to bind or act on behalf of the principal. Restatement (Second) Agency § 8 (1957). In other words, a principal is held accountable for the acts of one he "holds out" as his agent. In order to prevail on this theory of liability,

the Plaintiff must prove both a reasonable and justifiable reliance upon the principal's manifestations of authority, and that the conduct of the agent was within the scope of his apparent authority. See Gizzi v. Texaco, Inc., 437 F.2d 308, 309-10 (3d Cir.), cert. denied 404 U.S. 829 (1971); see also Note, Agency--Apparent Authority and Agency by Estoppel: Emerging Theories of Oil Company Liability for Torts of Service Station Operators, 50 N.C.L. Rev. 647 (1972).

The evidence submitted on this issue was as follows: that, during an interstate journey, Plaintiff observed the scallop shell sign from the highway; that knowing the sign to be affiliated with Shell Oil Company and that Shell was a national brand she

could trust, she exited toward the Mt. Hope Shell Station for a rest stop and to purchase coffee; that she had never purchased Shell's petroleum products and did not have a Shell credit card; that she remembered seeing two Shell "answer man" booklets; and that she believed Shell maintained a "safe place of business." Plaintiff contends that the scallop shell sign, Shell insignia and uniform worn by the night attendant, and the two "answer man" booklets are sufficient to constitute manifestations by Shell of the station's apparent authority. In Gizzi, supra, the court determined that the display of Texaco's insignia and slogan ("trust your car to the man who wears the star") were sufficient to raise a jury question on apparent authority, albeit not "an overwhelming

case of liability." 437 F.2d at 310. In Huffman v. Gulf Oil Corporation, 26 N.C.App. 376, 216 S.E.2d 383 (1975), the North Carolina Court of Appeals affirmed a directed verdict for the defendant Gulf Oil stating "that a dealer's activity in keeping a watchdog is clearly beyond the borderline of the apparent agency doctrine, especially where, as here, the watchdog is used in connection with a separate business on adjacent, but separately leased premises." 216 S.E.2d at 387. In both Gizzi and Huffman, the courts focused on the scope of the apparent authority wielded by the alleged agents, apparently accepting the plaintiffs' claims that the oil corporations' manifestations in the form of advertising were adequate indications of control on which the plaintiffs had

relied. Similarly in this case, the scallop shell sign which was observed from the highway and at the station would induce reasonable reliance that Shell held out this particular station to be its agent.

The manifestations alone, however, do not make Shell Oil liable because Plaintiff must also show that the purported agent's conduct was within the scope of his apparent authority. In Huffman, the court ruled in favor of Gulf since the dealer's activity was "clearly beyond" the scope of his apparent authority. In that case, the minor plaintiff's injuries were sustained in an attack by a dog which was kept by the station owner in connection with a separate coal and wood business operated on leased property separate from the service

station. Also, in Gizzi the trial court held that the principal's manifestations "could not possibly be construed to apply to installing new brake systems or selling used cars" but could apply to "the servicing of automobiles, ... to the extent of putting gas in them and the ordinary things that are done at service stations." 437 F.2d at 310. Although this holding was reversed by the court of appeals, it is clear that the dispositive element of proof concerned the scope of apparent authority. Likewise in this case, the issue of Shell's liability based on apparent authority hinges on the scope of authority held by the Terrys. Defendant Shell Oil contends that it should not be held liable since Plaintiff did not purchase any of its

petroleum or related products but only utilized restroom facilities and purchased coffee. The court is of the opinion that there is sufficient evidence to present a jury question as to whether the maintenance of safe premises, including restroom facilities, is within the scope of the Terrys' apparent authority. Unlike the operation of a coal and wood business as presented in Huffman, the operation of premises for safe public usage appears to be within the realm of reasonable expectation for service station operations.

Defendants' Alternative Motions for a New Trial

Defendants have also moved, in the alternative, for a new trial under Rule 59, Fed. R. Civ. P. The Defendant Shell Oil Company contends that the jury verdict was against the weight of

the evidence and was excessive. The Terry Defendants cite a number of grounds in addition to their arguments presented in support of their motion for judgment notwithstanding the verdict. They rely principally on an improper question by Plaintiff's counsel in cross-examination of Troy Terry concerning a twenty-five-year - old breaking and entering conviction, the court sustaining Plaintiff's objection to defense counsel's question to Sergeant Willis of the Greensboro Police Department on cross-examination which asked, "In your opinion would any measures have prevented this?", and the contention that the jury's findings were against the weight of the evidence and the product of sympathy, passion, and prejudice.

Assuming arguendo that the Plaintiff has met her burdens on foreseeability, negligence, and causation, the court does not believe that a new trial should be granted on the grounds that the verdict was against the weight of the evidence. The court is aware that upon a motion for a new trial under Rule 59 it has the responsibility to weigh all of the evidence and consider the credibility of witnesses and other pertinent factors to determine whether the verdict was "'against the clear weight of the evidence or is based upon evidence which is false or will result in a miscarriage of justice.'" Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891-92 (4th Cir. 1980), quoting Williams v. Nichols, 266 F.2d 389, 392 (4th Cir. 1959). Ordinarily,

a trial judge who believes the plaintiff's evidence to be insufficient as a matter of law would also believe that a verdict for the plaintiff based on the same evidence would be against the weight of the evidence. However, in this case there was practically no conflicting evidence to weigh; Defendants' witnesses did not contradict the Plaintiff's evidence and Defendants' cross-examination did nothing to impeach the Plaintiff's witnesses.[3] Therefore, the court believes that under the unique

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[3]The only significant credibility issue was the Terry Defendants' contention that they were not aware of previous criminal activity at the Mt. Hope Station in 1976, despite the fact that at the time they were operating another Shell station just fourteen miles away, and the December 1976 shooting at Mt. Hope received widespread media coverage. In weighing the evidence, the court would resolve this credibility issue against the Defendants.

circumstances of this case if Plaintiff's evidence is legally sufficient the verdict should stand, especially since the essential facts before the jury were not in dispute. Nor does the court believe that a new trial should be granted for the additional reasons cited by the Terry Defendants. As to the improper question by Plaintiff's counsel concerning the prior conviction of Troy Terry, the court immediately gave an instruction to the jury directing them to completely disregard the question; as to the question by defense counsel to Sergeant Willis, who was not qualified as an expert, the court ruled that any answer he would give to the question would not aid the jury and would be mere speculation, and the court also excluded it under Rule 403,

Fed. R. Evid., even if relevant and proper. The court does not believe that the other grounds cited by the Terry Defendants for a new trial, including the size of the verdict itself, the court's instructions as to the jury, or any of the other conclusory allegations by the Defendants, warrant a new trial. The court believes that the proper disposition of this case is to grant the Defendants' motions for judgment notwithstanding the verdict, and deny the Defendants' motions for a new trial, whereupon the issues of foreseeability, negligence, and causation will be reviewed fully by the court of appeals, and the jury's verdict will be either reinstated or set aside as may be deemed appropriate.

Defendant Shell Oil Company's Cross-Claims for Indemnity

Despite the granting of the Defendants' Rule 50(b) motions, the court will rule upon the cross-claims of Shell Oil Company so that all issues before the trial court will be resolved and can be considered by the court of appeals if necessary.

The jury verdict found that the Mt. Hope Shell Service Station and the Terry Defendants were liable to the Plaintiff, and that Shell Oil Company was also liable on the basis of apparent authority. Shell seeks full indemnity from the station and the Terrys for any damages that Shell may be called upon to pay to the Plaintiff by reason of the negligence of the station owners and operators. Shell's liability to the Plaintiff is derivative, based on the tortious

conduct of the station owners and operators, and therefore Shell is entitled to recover full indemnity from Mt. Hope Shell and the Terrys. See, e.g., Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968); Hornby v. Pennsylvania Nat. Mut. Cas. Ins., 77 N.C.App. 475, 484, 335 S.E.2d 335, 341 (1985), cert. denied, 316 N.C. 193, 311 S.E.2d 570 (1986).

Shell also seeks indemnity from Quality Oil Company, a limited partnership, based on a provision in the jobber contract between Shell and Quality. At the close of the evidence in this case, the court granted Quality's motion for a directed verdict and dismissed it from the case, ruling that there was insufficient evidence that Quality exercised control over the operations of the Mt. Hope Shell

Station. Paragraph 11.1 of the jobber contract between Shell and Quality provides as follows:

> 11.1 Indemnity. Buyer shall defend and indemnify Shell, its employees and agents, against all claims, suits, liabilities, losses and expenses (including attorneys' fees and other costs of litigation) arising out of any injury, disease or death of persons (including Buyer or Buyer's employees and including injury to personal rights or relations) or damage to property (including Buyer's) caused by or happening in connection with Buyer's loading, transportation, unloading, storage, handling, sale or use of the Products sold hereunder, except when caused (a) by the sole negligence of Shell, its employees or agents, or (b) by defects in the Products not caused or contributed to by any act or omission of Buyer or Buyer's employees or agents. Shell shall have the right, but not the duty, to participate in the defense of any claim or litigation with attorneys of Shell's selection. Buyer's obligations hereunder shall survive any termination of this contract.

Quality contends that any liability caused by the sole negligence of Shell

or its agents is specifically excluded from indemnification under Paragraph 11.1 in that the language provides that Quality shall defend and indemnify Shell from certain listed occurrences "except when caused (a) by the sole negligence of Shell, its employees or agents, ..." Quality points out that the jury in this action found that Shell was liable to the Plaintiff only because it believed that the Terry Defendants were clothed with apparent authority.

Quality also contends that a further reason for denying indemnity is that the assault on the Plaintiff was not an occurrence covered by the terms of Paragraph 11.1, in that the language provides that Quality shall defend and indemnify Shell for certain listed occurrences arising out of injury

"caused by or happening in connection with Buyer's [Quality's] loading, transportation, unloading, storage, handling, sale or use of the Products sold hereunder." Quality contends that the language used was drafted by Shell and clearly refers to injuries arising only out of the transportation and handling of Shell products, and not to unrelated incidents happening on the premises of stations to which Quality might ultimately supply gasoline.

The court finds the arguments of Quality to be persuasive. The jury found that Shell, by allowing the use of its signs, uniform, and other indicia of authority, allowed the Mt. Hope Shell Station to represent to third parties, and permitted them to believe, that the station had an agency relationship with Shell. Also, the

court does not believe from the evidence presented at trial concerning the jobber contract, and construing the instrument as a whole, that the indemnity provision was intended by the parties to apply to liability of this type, nor can such coverage be reasonably inferred from the language used. The claim in this case was not caused by nor did it happen in connection with the sale or use of gasoline pursuant to the jobber contract except in the very broadest sense. Any ambiguity should be construed against the drafter of the agreement. Therefore the court will deny the cross-claim by Shell Oil Company against the Quality Oil partnership.

A judgment and order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

In the event the jury's verdict is reinstated, the court will enter an appropriate order or judgment based on the rulings made in this memorandum opinion concerning the Defendant Shell Oil Company's cross-claims against the Defendants Charles Lawrence Terry and Troy Virgil Terry, both individually and doing business as Mt. Hope Shell Service Station, the Defendant Mt. Hope Shell Service Station, and the Defendant Quality Oil Company seeking indemnity for any potential liability of Shell to the Plaintiff in this case.

September 4, 1986

/s/Frank W. Bullock, Jr.
United States District Judge

OPINION OF COURT OF APPEALS FOR FOURTH CIRCUIT AFFIRMING JUDGMENT IN DISTRICT COURT

(Decided August 26, 1987)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1690

LAURA REAGIN

Plaintiff - Appellant

v.

CHARLES LAWRENCE TERRY, d/b/a Mt. Hope Shell Service Station, individually; TROY VIRGIL TERRY, d/b/a Mt. Hope Shell Service Station, individually; MT. HOPE SHELL SERVICE STATION, a partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY I, Limited Partnership; QUALITY OIL COMPANY II, Limited Partnership

Defendant - Appellee

No. 86-1694

LAURA REAGIN

Plaintiff - Appellee

v.

SHELL OIL COMPANY

Defendant - Appellant

and

CHARLES LAWRENCE TERRY, d/b/a Mt. Hope Shell Service Station, individually; TROY VIRGIL TERRY, d/b/a Mt. Hope Shell Service Station, individually; MT. HOPE SHELL SERVICE STATION, a partnership; EDWARD C. BRASINGTON; QUALITY OIL COMPANY I, LIMITED PARTNERSHIP; QUALITY OIL COMPANY II, LIMITED PARTNERSHIP

Defendants

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Frank W. Bullock, Jr., District Judge. (CA-84-470-G)

Argued: May 7, 1987

Decided: August 26, 1987

Before HALL, PHILLIPS, AND WILKINS, Circuit Judges.

David M. Clark (John R. Erwin; B. Douglas Martin; Clark & Wharton on brief) for Appellant; Frederick K. Sharpless (Joseph E. Elrod, III; J. Reed Johnston, Jr.; Tuggle, Duggins, Meschan & Elrod on brief); Richard V.

Bennett (William K. Davis; Bell, Davis & Pitt, P.A. on brief); Leigh F. Saint-Germain (William G. Lowerre on brief) for Appellees.

PER CURIAM:

Plaintiff Laura Reagin appeals the district court's grant of Defendants' motion for judgment notwithstanding the verdict. In granting the motion, the district court held that on the evidence presented the Defendants were not liable for the criminal acts committed by a third person. We affirm.

I.

Reagin departed Atlanta, Georgia on the evening of June 16, 1982 to journey to her brother's wedding in New Jersey. She traveled without incident until approximately 3:30 a.m. when she neared Greensboro, North Carolina. She then exited form the interstate highway

at the Mount Hope Shell Station to use the restroom and purchase some refreshments.

Approximately forty-five minutes to one hour earlier, Lorenzo Woodward had arrived at the station on foot. Woodward, released from prison a few days earlier, had been dropped off at the interstate exit by two friends after telling them he wanted to rob something. He entered the Mount Hope station and informed the attendant, Edward Brasington, that he had encountered mechanical problems with his automobile on the interstate.[1] Brasington told Woodward that a tow truck driver would be in at 6:00 a.m.,

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[1]Because the district court granted Brasington's motion for summary judgment, the majority of his deposition testimony was not before the jury. However, we have included portions of his testimony in order to provide a full recitation of the facts.

but could be called immediately for an additional charge. Woodward declined the offer of an immediate call and remained in the station, chatting with Brasington.

When a food merchandise salesman arrived and began servicing the station, Woodward twice entered the restroom complaining of stomach pain. Following the departure of the salesman, Woodward approached Brasington from behind with what Brasington testified was a sawed-off .22 caliber rifle. This gun was never located by law enforcement officers. Woodward then removed a .25 caliber handgun from Brasington's pocket.

It was at this time that Reagin drove into the station parking lot. She testified she could only see the men's heads above the merchandise racks

against the windows. She entered the station and went directly to the restroom. She stated that Brasington looked at her as she passed through the station, although Brasington denied this. When asked by Woodward if a woman entered, Brasington said no, it was a man, mistakenly believing that a white male accomplice to Woodward had arrived at the station.

While Reagin was in the restroom, Woodward emptied the cash register and marched Brasington at gunpoint to the side of the station parking area. Reagin exited the restroom and, looking over the merchandise racks once again, saw the heads of the two men. She testified that she believed they were going to look at a car.

Woodward took Brasington to a darkened area under a burned out

perimeter light and told him to cross a small wooden fence and keep walking. Brasington did as he was told. Woodward returned to the station and approached Reagin from behind as she waited to pay for items she had selected. He robbed her, took her to the same area where he had taken Brasington, and raped her. At one point, Woodward remarked, "He's going to get himself killed." Reagin testified she looked up and saw Brasington, from a distance, watching them from a field adjacent to the station lot. Brasington testified he began to return to the station from the field after a few minutes, but a figure in the shadows motioned him away. He then walked across the field, through a forest, crossed a road and attempted to get help at a residence, but was unable

to obtain assistance. Meanwhile, Woodward forced Reagin to leave with him in her automobile. Brasington eventually returned and called the police, reporting he had been robbed by a black male and a white male. Woodward subsequently abandoned Reagin and the automobile. He was eventually apprehended.

II.

Reagin brought suit against several Defendants associated with the operation of the station, alleging responsibility for the criminal acts of Woodward. Pursuant to various rulings by the district court, the case was submitted to the jury only as to the two partners who owned and operated the station, the partnership itself, and Shell Oil Company. The jury returned a verdict in Reagin's favor, finding the

criminal acts were reasonably foreseeable, the Defendants breached their duty of care, and that Reagin's injuries were caused by the breach.

Subsequently, the district court denied Defendants' motion for a new trial and granted the motion for judgment notwithstanding the verdict. In a written order, the court first held Reagin presented "just enough" evidence to permit the jury to find it was reasonably foreseeable that criminal acts would occur on the premises. The court went further and ruled that assuming the evidence was sufficient to establish a breach of ordinary care by the failure to take additional security precautions, it was mere speculation for the jury to find the alleged breaches were the cause of

Reagin's injuries.[2] The court specifically stated "[i]t cannot be said on the basis of [the] evidence presented at trial that Defendants' conduct actually caused Plaintiff's injuries as a matter of fact; neither can it be said that those injuries would not have been sustained without Defendants' conduct or failure to act."

III.

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[2]Although we affirm the district court's decision on the basis of lack of causation, we note that Reagin's claim of negligence in having merchandise racks blocking her view into the station is without foundation.

Reagin relies on the Shell Appearance Guide which provides: "Windows are made to look into and see out of. The first rule for any window display is to start with sparkling clean windows both inside and outside." However, the instruction refers to cleanliness prior to setting up a display, and does not involve security concerns. In fact, the window posters pictured in the guide would have blocked Reagin's view just as the merchandise racks did.

In reviewing the grant of a judgment notwithstanding the verdict, we must view the evidence and the inferences therefrom in the light most favorable to the non-moving party. The inferences drawn by the jury to reach its verdict must be reasonably probable; mere speculation is insufficient. E.g., Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-42 (4th Cir. 1982).

In the instant case the district court found the inferences drawn by the jury on the question of causation failed to rise to the level of reasonable probability. While we have the utmost sympathy for Reagin, our careful review of the record conclusively shows that the assessment made by the district court was correct. Accordingly, for the reasons stated by

the court below, we affirm the grant of the Defendants' motion for judgment notwithstanding the verdict. The remaining issues raised on appeal are mooted by the affirmance of the district court's decision.

AFFIRMED.

ORDER OF COURT OF APPEALS OF FOURTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed October 7, 1987)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1690
No. 86-1694

Laura Reagin,

Appellant,

versus

Charles Lawrence Terry, etc., et al,
Appellees.

On Petition for Rehearing with
Suggestion for Rehearing In Banc.

O R D E R

The appellant/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Hall and Judge Phillips.

For the Court,
/s/John M. Greacen, Clerk

JUDGMENT AND ORDER OF DISTRICT JUDGE ALLOWING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT BRASINGTON

(Filed March 26, 1986)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

LAURA REAGIN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO.
	)	C-84-470-G
CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station;)	)	
MT. HOPE SHELL SERVICE STATION, a Partnership;	)	
EDWARD C. BRASINGTON;	)	
SHELL OIL COMPANY;	)	
QUALITY OIL COMPANY OF STATESVILLE, INC.; and	)	
QUALITY OIL COMPANY, a Limited Partnership,	)	
	)	
Defendants	)	

JUDGMENT and ORDER

BULLOCK, District Judge

For the reasons set forth in a memorandum opinion filed contemporaneously herewith,

IT IS ORDERED and ADJUDGED that the motion for summary judgment of Defendant Edward C. Brasington is GRANTED and that this action be, and the same hereby is, DISMISSED as to Defendant Brasington; and

IT IS ORDERED that the motions for summary judgment of Defendants Charles Lawrence Terry, Troy Virgil Terry, Mt. Hope Shell Service Station, Shell Oil Company, Quality Oil Company of Statesville, Inc., and Quality Oil Company are DENIED.

March 26, 1986.

/s/Frank W. Bullock, Jr.
United States District Judge

MEMORANDUM OPINION OF DISTRICT JUDGE ALLOWING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT BRASINGTON

(Filed March 26, 1987)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

LAURA REAGIN,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO.
	)	C-84-470-G
CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station;) MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

BULLOCK, District Judge

In this diversity of citizenship action all Defendants have filed motions for summary judgment. Plaintiff Laura Reagin seeks compensatory and punitive damages for injuries arising from criminal acts that occurred at the Mt. Hope Shell Service Station on June 17, 1982. She alleges that Defendants Shell Oil Company, Quality Oil Company, Quality Oil Company of Statesville, inc., and Charles and Troy Terry, both as individuals and in their capacity as the Mt. Hope Shell Station's partnership, were negligent in the supervision, maintenance, and safeguarding of the premises. Plaintiff also alleges that Defendant

station attendant Edward C. Brasington negligently failed to summon the police in a timely fashion while the attack was in progress. After consideration of the extensive briefs, supplemental briefs, and supporting documents filed in support of and in reply to Defendants' motions, as well as the applicable North Carolina legal standards, the court will grant summary judgment to Defendant Edward C. Brasington, but will deny all remaining Defendants' motions.

FACTUAL BACKGROUND[1]

The action before this court arose from criminal acts which were perpetrated at the Mt. Hope Shell Service Station on June 17, 1982. Mr. Edward C. Brasington, who is 40%

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[1]The court's summary of the factual background is taken from the pleadings, affidavits, depositions, and briefs of the parties.

disabled on one side of his body due to a stroke, was the sole attendant on duty during the "third shift" from midnight until 6:00 a.m. Sometime after 3:00 a.m. on June 17, a man, who claimed that his car had broken down on Interstate 85, entered the station and asked for a wrecker. Upon being told that no such service would be available under 6:30 a.m. he lingered in the station, excusing himself to use the restroom three different times. After his third retreat to the men's room, the man emerged and walked up behind the then-seated attendant with what Mr. Brasington took to be a sawed-off .22 caliber rifle. The robber then proceeded to "hold up" Brasington, taking his billfold and his pistol.

As this was occurring, Ms. Reagin entered the station and went directly

to a ladies' room, not noticing that a robbery was in progress. While she was using the facilities, the robber directed Mr. Brasington to give him the cash register contents, exit the station, walk to and step over the rear fence surrounding the service area, and walk across the adjacent field into nearby woods. The robber then returned to the station, where he found Ms. Reagin standing at the counter and, threatening her with Mr. Brasington's pistol, instructed her to empty her pockets. Subsequently the assailant led the Plaintiff outside where he first unsuccessfully attempted to rape her near the trash dumpster, and then successfully completed the act by the fence. He immediately kidnapped Ms. Reagin for a period of time, using her automobile for his escape.

Just before this assault began, Mr. Brasington started to return to the station area and was threateningly waved back by the robber. According to the Defendant attendant, who claims he was never close enough to see that the second "shadowy figure" was a woman, he then made his way through the woods and across the street where he first attempted to rouse the residents of the only house in that area. When they refused to answer at that late hour, Brasington allegedly hid behind a pickup truck and watched the station until it appeared that the robber must have departed. In her deposition and complaint, Ms. Reagin states that before Brasington crossed the street he returned to the area where she was attacked and observed the rape in progress. Whether or not this is the

case, Brasington did contact the Sheriff's Department at about 4:20 a.m., when it became clear to him that the robber had departed.

Subsequent to the apprehension of and disposition of the case against her assailant, Ms. Reagin commenced the present action.

DISCUSSION

Federal Rule of Civil Procedure 56(b) permits the court to grant summary judgment only if the pleadings, depositions, interrogatory answers, admissions, affidavits, and other documents show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The burden is on the moving party to make such a showing. The court must assess any inferences from the depositions and

other documentary material in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Even if there is no dispute as to the evidentiary facts, summary judgment is inappropriate if conflicting inferences reasonably can be drawn from those facts. Fortress Re, Inc. v. Central National Insurance Company of Omaha, 766 F.2d 163, 166 (4th Cir. 1985); Magill v. Gulf & Western Indus., Inc., 736 F.2d 976, 979 (4th Cir. 1984). Summary judgment is rarely appropriate in actions based upon negligence. Spaulding v. ADS-Anker Data Systems Midwest, Inc., 498 F.2d 517, 518 n.1 (4th Cir. 1974); see also C. Wright, A. Miller & M. Kane, Federal Practice and Procedure Civil § 2729 at 194 (1983).

I. Motions for Summary Judgment of Defendants Charles and Troy Terry, Mt. Hope Shell Service Station Partnership, Shell Oil Company, Quality Oil Company of Statesville, Inc., and Quality Oil Company.

Whereas federal law controls the issue of when summary judgment is appropriate, under the Erie doctrine North Carolina state law controls the issue of what duty a landowner or proprietor owes to business invitees who are attacked by third-party criminals. The North Carolina Supreme Court has held that

> Under both the Restatement (Second) of Torts and the prior decisions of this court, foreseeability is the test in determining the extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons .... If an invitee [while on the premises sustains an injury] from the criminal acts of a third person, which acts were reasonably foreseeable by the store owner, and which could have been prevented by the exercise of ordinary care, then the plaintiff

> has set forth a cause of action in negligence which, if proved, would entitle that plaintiff to recover damages from the store owner.

Foster v. Winston-Salem Joint Venture, 303 N.C. 636, __, 281 S.E.2d 36, 39 (1981). The North Carolina courts have also discussed the extent to which evidence should be admissible to prove foreseeability of the criminal act. In a recent decision the North Carolina Court of Appeals reviewed the evidentiary rule applied by other jurisdictions in this situations, and finding a "dramatic variant in willingness to consider evidence of criminal activity not occurring on the premises," the court expressed its preference for the "cases that take a more inclusive approach, considering the primary and the surrounding neighborhood, as well as the location and character of the business

enterprise." Sawyer v. Carter, 71 N.C.App. 556, _, 322 S.E.2d 813, 816 (1984). Thus, the court concluded that it sees "no need to adopt a bright-line rule limiting evidence exclusively to that of prior times on the premises. [All relevant evidence is admissible and] evidence pertaining to the foreseeability of criminal attack shall not be limited to prior criminal acts occurring on the premises." Id. at 817.

Under this standard it would be inappropriate to grant summary judgment for a Defendant whose position in relation to the service station is that of proprietor, station owner, or one who exercises control over the safety features of the station. The pleadings and depositions submitted to the court reveal several evidentiary facts that

would be relevant at trial to the issue of foreseeability. This evidence includes: the isolated location of this station by Interstate 85; the fact that a direct line to the Sheriff's Department had been installed in the station, indicating that the owners were concerned about this location; the station owners' practice of leaving only a partially-disabled employee on duty during the late-night shift, and Mr. Brasington's own testimony that he carried a gun for his own protection and made it a practice to use the direct Sheriff's telephone line two or three times a week to report "a suspicious vehicle or a suspicious person walking off the Interstate."

It would also be inappropriate at this time to dismiss either of the Quality Oil Companies or the Shell Oil

Company from this action, the Plaintiff having presented valid arguments about both the extent of these Defendants' control over the safe maintenance of this Shell station, and the Plaintiff's reliance on the Shell name and its association with safety. The documents before this court also reveal some ambiguities as to whose safety and maintenance standards were being applied to this station. For instance, in his deposition Charles Terry states that Quality now makes occasional inspections during the year, which formerly were made by Shell. Further, a representative of Quality told Terry that the company would exercise the same "strict standards" as did Shell. It is not clear from the "jobber contract" between Quality and Shell that Shell had thereby relinquished the

application of its standards to the local Shell stations. Thus, at this juncture the court will not grant Defendants' motions for summary judgment. In so holding this court states no conclusions as to the ultimate viability of each claim Plaintiff has presented against each of the Defendants.

II. Defendant Edward C. Brasington's Motion for Summary Judgment.

The law traditionally has refused to impose a duty upon one to aid another who is in peril. Exceptions have been carved out to this doctrine where a special relation between the parties has afforded a justification for the creation of a duty. This duty has been imposed upon: family members, innkeepers, carriers, employers, those affected by maritime law, and

shopkeepers. W. Prosser, The Law of Torts 4 Ed. 340-43 (1971). It is generally agreed that where this duty is recognized it calls for nothing more than reasonable care under the circumstances. This doctrine has been recognized by the North Carolina courts which have long held that "there is no duty to aid others in peril without the defendant's fault [or negligence], but through his conduct [citations omitted]; yet if plaintiff is hurt through defendant's [negligence], defendant must take all steps necessary to mitigate the hurt." Parrish v. Atlantic Coast Line R. Co., 221 N.C. 292, 300, 203 S.E.2d 199, _ (1942) (plaintiff was injured in collision between his automobile and defendant's train, after which defendant's employees allowed him to lie

unconscious on the roadbed approximately one hour).

The North Carolina courts have not directly addressed the question of whether a business owner and his employees have a duty to rescue or seek assistance for an invitee who is imperiled by a third party's criminal acts. However, upon reviewing analogous North Carolina law and the analyses of other jurisdictions, the court concludes that North Carolina courts would impose such a duty only if the threat to the invitee came to the business employee's attention in time for him to act, and only if the employee could act without fear of risking injury himself.

The Louisiana courts have formulated this very standard in similar cases, holding that they will

impose liability only when there is sufficient time for police response before plaintiff's injury and if the proprietor (or his representative) could summon the police or warn the plaintiff of danger without incurring the risk of harm. Higgins v. New Orleans Public Service, Inc., 347 S.2d 944 (1977); Anderson v. Clements, 284 S.2d 241 (1973). Similarly, the Illinois courts have followed a Pennsylvania decision, Noll v. Marian, 347 Pa. 213, 32 A.2d 18 (1943), in holding that no duty to comply with criminal demands should be imposed upon an employee, even when such resistance by the employee caused the bystander plaintiff to be injured. Bence v. Crawford Savings and Loan Association, 400 N.E.2d 39 (Ill.App. 1979); Boyd v.

Racine Currency Exchange, Inc., 306 N.E.2d 39, 66 Ill.2d 95 (1973).

There is analogous North Carolina precedent to uphold this line of reasoning. The state supreme court has held that: "In the place of amusement or exhibition, just as in the store ... the proprietor is liable for injuries resulting from the horseplay or boisterousness of others [only] ... if he has sufficient [and timely] notice to enable him to stop the activity." Manganello v. Permastone, Inc., 291 N.C. 666 (671), 231 S.E.2d 678 (1977) (quoting Aser v. City of Charlotte, 265 N.C. 494, 144 S.E.2d 610, 615 [1965]).

Mr. Brasington and Ms. Reagin have offered conflicting versions of the sequence of events on June 17, 1982. Mr. Brasington has stated that he never knew that a second person he saw was a

woman, much less that she was being assaulted. Ms. Reagin stated that Brasington returned twice to approach the darkened area beside the station, and the second time observed the rape while it was in progress. If so, the court notes that he would have also observed the assailant's departure with her immediately thereafter. At that time he would have been likely to telephone the Sheriff's Department from the station, rather than crossing the street again to delay his call until another customer stopped at the Shell station and he was certain that it was safe to return.

The court concludes that, regardless of whose account would be more persuasive to the trier of fact, this is not an issue of material fact to be carried past the summary judgment

stage, as Mr. Brasington was under no legal duty to rescue Ms. Reagin. Neither version describes circumstances in which Mr. Brasington either could have summoned the police in time to stop the attack on the Plaintiff, or could have done so without fearing that his own safety was at risk. Furthermore, even if Brasington witnessed the attack on Ms. Reagin, he was under no duty to ignore the assailant's threats by attempting to rescue her himself, perhaps further endangering himself and her in doing so.

For the foregoing reasons the court will grant Defendant Edward C. Brasington's motion for summary judgment and deny all remaining Defendants' motions for summary judgment.

March 26, 1986

/s/Frank W. Bullock, Jr.
United States District Judge

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   Mehra v. Bentz, 529 F.2d 1137, 1139 (2d Cir. 1976), cert. denied 426 U.S. 922, 96 S.Ct. 2628, 49 L.Ed.2d 375 (1976)

   Sixth

   Pinkley v. Seaboard System Railroad, 813 F.2d 787, 789 (6th Cir. 1987)

   Seventh

   Dickerson v. Amax, Inc., 739 F.2d 270, 272 (7th Cir. 1984)

2. Circuits which hold federal standard governs:

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   Cowdell v. Cambridge Mutual Ins. Co., 808 F.2d 160, 162 (1st Cir. 1986)

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   Wratchford v. S. J. Groves & Sons, Inc., 405

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Boeing Co. v. Shipman, 411 F.2d 365, 369-70 (5th Cir. 1969) (en banc)

Ninth

Kabatoff v. Safeco Insurance Co. of America, 627 F.2d 207, 209, n. 2 (9th Cir. 1980)

Tenth

Peterson v. Hager, 724 F.2d 851, 853 (10th Cir. 1984)

Eleventh

Kaiser v. Coliseum Properties, Inc., 764 F.2d 783, 785 (11th Cir. 1985)

3. Circuits where a conflict exists:

Third

Leizerowski v. Eastern Freightways, Inc., 514 F.2d 487, 490 (3d Cir. 1975) (state); Walsh v. Michle-Goss-Dexter, Inc., 378 F.2d 409, 414

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(federal)

Eighth

Gisriel v. Uniroyal, Inc., 517 F.2d 699, 701 (8th Cir. 1975) (state); Lackawanna Leather Co. v. Martin & Stewart, Ltd., 730 F.2d 1197, 1200 (8th Cir. 1984) (federal)

87-1149(3)

Supreme Court, U.S.
FILED
FEB 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

October Term, 1987

LAURA REAGIN,

Petitioner,

v.

CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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31pp

QUESTION PRESENTED

Whether the courts below correctly determined that the plaintiff was not entitled to have her case submitted to a jury because, viewing the evidence at trial in the light most favorable to the plaintiff, the plaintiff failed to present sufficient evidence to warrant a jury finding that the asserted negligence of the defendants was a cause-in-fact of the plaintiff's injuries.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

LAURA REAGIN,

Petitioner

v.

CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions, judgments and orders of the United States District Court for the Middle District of North Carolina have not been reported and appear in the Appendix to the Petition (Pet. App. 1, 5, 58 and 60). The opinion of the United States Court of Appeals for the Fourth Circuit has not been reported and appears in the Appendix to the Petition (Pet. App. 45).

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1987. A petition for rehearing was filed on September 9, 1987, and denied by order dated October 7, 1987. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATEMENT

(1) This matter arises out of a diversity action brought by the petitioner, Laura Reagin, to recover for damages and injuries she sustained when she was raped and kidnapped while she was on the premises of Mt. Hope Shell Service Station during the early morning hours of June 17, 1982. The respondents Charles and Troy Terry are the co-owners of defendant Mt. Hope Shell Service Station ("Mt. Hope Shell"), a partnership, and operate the independent service station and convenience store known as Mt. Hope Shell. Mt. Hope Shell is located in rural Guilford County, North Carolina, at the intersection of Interstate 85 and Mt. Hope Church Road. The respondents Quality Oil Company, a limited partnership, Quality Oil Company

of Statesville, Inc., and Shell Oil Company, market petroleum and related products and were named as defendants on various agency and apparent authority theories.

(2) Ms. Reagin was raped and kidnapped by one Lorenzo A. Woodward, an individual who, as of June 17, 1982, had a long criminal record (R 420) and who had been in prison until just a few days before June 17, 1982 (R 417, 420). During the evening hours of June 16, 1982, Woodward and two accomplices, William McDonald and Tommy Farrington, all of whom were from Durham, North Carolina, were in Greensboro, North Carolina, (R 412, 414). At about 2:30 a.m. on June 17 these individuals started back to Durham from Greensboro and were traveling on Interstate 85. Once they got on Interstate 85, but

before they came upon Mt. Hope Shell, Woodward announced that he wanted to "rob something" (R 414). Thereafter, upon seeing Mt. Hope Shell, Woodward demanded that McDonald and Farrington get off at the Mt. Hope Church Road exit. When this demand was refused, Woodward pulled a gun on McDonald and Farrington and forced them to drive up the exit ramp. When the vehicle got to Mt. Hope Church Road, but while it was still some distance from the station, Woodward got out of the vehicle and McDonald and Farrington drove off, back on to the interstate. Woodward approached the station on foot (R 413-418, 420, 438).

Edward C. Brasington was the third shift attendant on duty at Mt. Hope Shell during the early morning hours of June 17, 1982. Sometime between 2:30

and 3:00 a.m. Woodward entered the station and told Brasington that his automobile had transmission trouble and was disabled on the interstate. Woodward inquired about wrecker service and Brasington informed him that a wrecker driver would not be available without an extra $20.00 charge until 6:30 or 7:00 in the morning. Woodward told Brasington that he would wait until the morning to call a wrecker (R 15-20, 592-593, 607-610). It was not unusual for individuals to walk to the station from the interstate and report automobile trouble during the third shift; this happened as often as two or three times a week (R 23, 655, 727). Brasington testified that nothing about Woodward struck him as unusual and that Woodward acted just like a regular customer (A. 21-22, 594, 612). Woodward

chatted with Brasington about the trip he was supposedly on. Later, a route salesman arrived at the station. Woodward excused himself to go to the restroom on two or three occasions, complaining of stomach problems.

Subsequently, while Woodward was in the restroom, Brasington poured himself a cup of coffee and went to sit at a table located inside the station (R 595-596). While Brasington was seated at the table, Woodward approached, stuck a sawed-off shotgun or rifle in Brasington's side, and announced that he was holding up the station (R 595-596). Mr. Woodward then took from Brasington's pockets a billfold and a small .25 caliber pistol Brasington carried while on duty. At about this time, Brasington heard an automobile drive into the station and park.

Brasington then noticed, out of the corner of his eye, a person he thought to be a man enter the station and go to the restroom area.

Thereafter, Woodward emptied the cash register and forced Brasington, at gunpoint, to leave the station and go to an area towards the rear of the station on the north side of building. Brasington was then forced to climb a fence and proceed into a field behind the station. Woodward told Brasington to walk and to "hurry up or I'll blow your damned head off" (R 599). Brasington testified that he was certain he was about to be killed. When Brasington got to the edge of the field, near some woods, he stood there for sometime and then started back towards the station. Brasington was then again told that he would be killed if he did

not get out of there. Brasington, in an effort to get some help, walked through the woods and fields near the station, crossed New Hope Church Road, and went to the only residence in the area in an effort to obtain assistance and notify the police. Brasington was unsuccessful in arousing anybody at the residence.

Ms. Reagin, at the time Brasington and Woodward were standing by the table, entered the station and went directly to the restrooms. Ms. Reagin testified the station was well lighted.[1]

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[1] The evidence established that the interior and exterior of the station proper were well lighted. There were also five pole lights around the perimeter of the station premises. One of these pole lights was out. The evidence established that this light had gone out a day or so before the incident in question, that a repairman had been called but could not repair the light until a part was obtained, and that the part had been ordered but had not yet arrived.

Ms. Reagin further testified that she saw Brasington and Woodward at the table and specifically further testified that she noticed nothing out of the ordinary. When Ms. Reagin came out of the restroom she noticed two men outside the station, walking towards the north side of the station. Ms. Reagin poured herself a cup of coffee, got a bag of popcorn, and stood near the cash register, waiting to pay. Shortly thereafter, she heard a voice behind her state "turn out your pockets" (R 334, 360). Ms. Reagin turned around and saw Woodward holding a small silver gun at her head. Ms. Reagin gave Woodward the $2.00 or $3.00 she had in her pocket and a silver zippo lighter. Woodward then led Ms. Reagin out of the station and to the north side of the station, at the area where he had previously forced Brasington to climb

the fence. Woodward raped Ms. Reagin. While they were in this area a figure was seen off in the area beyond the fence. Ms. Reagin testified that she heard Woodward state "he's going to get himself killed" (R 336-337).

After perpetrating the rape, Woodward then, still holding Ms. Reagin at gunpoint, drove to Durham, North Carolina, in Ms. Reagin's car where he released Ms. Reagin (R 337-339). Ms. Reagin testified that she was terrified by Woodward and complied with his demands out of fear that she would certainly be killed if she resisted.

Based on an informant's tip of a planned robbery received by the Durham Police Department prior to June 17, Woodward was promptly arrested in Durham County on the afternoon of June 17. Woodward was eventually sentenced to 40

years in prison for the events which occurred at Mt. Hope Shell.

(3) At the conclusion of discovery, all respondents moved for summary judgment. Judge Frank W. Bullock, Jr., by Memorandum Opinion, Judgment and Order (Pet. App. 58, 60) denied summary judgment as to all respondents except Edward Brasington, as to whom summary judgment was granted. At trial, all respondents made appropriate motions for a directed verdict at the conclusion of the petitioner's evidence and at the conclusion of all evidence. All such motions were denied with the exception of the motions for a directed verdict made by Quality Oil Company of Statesville, Inc. and Quality Oil Company, a limited partnership, which motions were granted.

The case was submitted to the jury as to the respondents Charles Terry, Troy Terry, Mt. Hope Shell Service Station, and Shell Oil Company. The jury returned with a verdict against these respondents, awarding Ms. Reagin $450,000.00. These respondents made timely motions for judgment notwithstanding the verdict, or in the alternative, for a new trial. By Memorandum Opinion, Judgment and Order, the District Court granted the motions for judgment notwithstanding the verdict and directed that the verdict be set aside (Pet. App. 1, 5). On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the rulings of the District Court (Pet. App. 45).

ARGUMENT

The courts below correctly held that the plaintiff failed to present

sufficient evidence to warrant the submission of her case to the jury. No conflict between the circuits exists which would be determinative of the outcome of this case and this case presents no question which warrants further review by this Court.

1. The District Court, and the Fourth Circuit upon its independent review on appeal of the record in this case, correctly determined that the petitioner failed to present sufficient evidence on the critical issue of causation to warrant the submission of her negligence case to the jury.

The critical and undisputed facts pertaining to causation are as follows: (a) Woodward was a brutal, hardened and experienced criminal with a long record of criminal convictions, including violent crimes such as assault on a law

enforcement officer. The record established that Woodward had been released from prison only a few days prior to when he raped and kidnapped Ms. Reagin. (b) Woodward was possessed of the pre-determined intent to "rob something" prior to even knowing of the existence of Mt. Hope Shell. Woodward announced his intent to "rob something" to his acquaintances McDonald and Farrington, prior to coming upon the interstate exit where Mt. Hope Shell was located. Indeed, Woodward's prompt arrest was facilitated by the fact that the Durham Police Department had received an informant's tip of a planned robbery prior to the events at Mt. Hope Shell. (c) At the time, while still out on the interstate highway, when Woodward actually selected Mt. Hope Shell as a target for his planned armed robbery, he

knew nothing about the station other than that it existed and was open. (d) When Woodward left the automobile in which he was a passenger, while still out on the interstate exit ramp, Woodward, armed with a sawed-off rifle or shotgun and with an announced pre-disposition to commit a robbery, was alone at night in a rural area and was without transportation. As of this moment, the commission of a crime was inevitable. (e) The time Woodward spent at the station prior to actually commencing the robbery makes it clear that he would have been careful (and in fact was careful) to bide his time and make sure that he could perpetrate his crimes with the least possible chance of interference and the highest probability of success. In short, the undisputed facts in this case could lead a jury to

only one rational and reasonable inference with respect to causation: the injuries sustained by Ms. Reagin were caused by the happenstance that she arrived at Mt. Hope Shell at the same time Woodward was present at the station and nothing that the respondents did or failed to do was a "but for" or "substantial factor" cause of those injuries. On facts less persuasive than those present in this case, other courts have held, as a matter of law, that causation was not established. See, e.g., Noble v. Los Angeles Dodgers, Inc., 168 Cal.App.3d 912, 214 Cal. Rptr. 396 (1985) and Constance B. v. State, 178 Cal.App.3d 200, 223 Cal. Rptr. 645 (1986).

2. Petitioner argues that certiorari ought to issue in this case so that this Court can resolve the

conflict in the circuits on whether a state or federal standard applies to the determination of whether sufficient evidence has been presented to warrant the submission of an issue to a jury. While such a conflict does exist, that conflict has no bearing on the outcome of this case. The federal standard adopted by the Fourth Circuit and the standard which would have been applied had this case been decided in the North Carolina state courts, are identical.

As stated in its opinion, the Fourth Circuit (as did the District Court) applied the standard of reasonable probability to determine whether there was sufficient evidence to warrant the submission of the causation issue, i.e., whether from the evidence, taken in the light most favorable to the plaintiff, a jury could draw the

inference that it was reasonably probable that the alleged negligence of respondent was a "but for" or a "substantial factor" cause of the injuries suffered by the petitioner.[2] The Fourth Circuit's insistence that the inferences drawn by a jury must be reasonably probable before an issue can be submitted to the jury is set forth in numerous decisions. See, e.g.,

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[2] There are two aspects to causation, cause-in-fact and proximate causation. See Harper, James & Gray, The Law of Torts, Vol. 4, §§ 20.1 et seq. (2d Ed. 1986). Cause-in-fact deals with the factual question of whether the alleged negligence of the defendants was a "but for" or a "substantial factor" cause of the injuries sustained by the plaintiff. The proximate causation question only arises after cause-in-fact is established and pertains to the essentially legal question of whether the defendants' responsibility for the plaintiff's injuries will be cut off even though cause-in-fact exists. The causation question in this case deals solely with the cause-in-fact issue.

Fitzgerald v. Manning, 679 F.2d 341 (4th Cir. 1982); Owens by Owens v. Bourns, Inc., 766 F.2d 145 (4th Cir.) cert. denied 106 S.Ct. 608, 88 L.Ed.2d 586 (1985); Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982); Ralston Purina Co. v. Edmonds, 241 F.2d 164 (4th Cir. 1957); Ford Motor Co. v. McDavid, 259 F.2d 261 (4th Cir. 1958). The standard of reasonable probability, of course, is nothing more than an expression of the time honored requirement that the plaintiff prove the elements of a civil case by a preponderance of the evidence.

North Carolina likewise would use the reasonably probable standard to determine the sufficiency of evidence on causation. The standard which would have been applied had the case been tried in state court is best enunciated

in the recent decision of the North Carolina Court of Appeals in White v. Hunsinger, Slip. Op. (No. 873SC357, January 5, 1988). White involved a medical malpractice claim where it was alleged that the plaintiff's decedent died because of a delay in his being treated by a neurosurgeon. In response to a defense motion for summary judgment, the plaintiff submitted the affidavit of an expert which stated the opinion that, had the decedent been transferred to the care of the neurosurgeon at an earlier point in time, the decedent's chances of survival would have been increased. The Court held that this affidavit provided a sufficient forecast of the evidence to give rise to a jury question with respect to the negligence issue but failed to forecast sufficient evidence

on the causation issue. Hence, summary judgment in favor of the defendants was held proper. The Court stated:

> On the record before us, plaintiff has failed through affidavit or otherwise to forecast any evidence showing that had Dr. Hunsinger referred Bradley to a neurosurgeon when Bradley was first brought to the hospital, Bradley would not have died. The connection or causation between the negligence and death must be probable, not merely a remote possibility. Bridges v. Shelby Woman's Clinic, P.A., [72 N.C.App. 15, 323 S.E.2d 372 (1984), disc. rev. denied, 313 N.C. 596, 330 S.E.2d 605 (1985)] (Slip. Op. at 7-8).

See also Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964); McHarias v. Weathers Brothers Moving & Storage, 257 N.C. 767, 127 S.E.2d 548 (1962); Lee v. Stevens, 251 N.C. 429, 111 S.E.2d 623 (1959); Garland v. Shull, 41 N.C.App. 143, 254 S.E.2d 221 (1979); Casison v.

Cliff, 38 N.C.App. 617, 248 S.E.2d 362 (1978).

3. The petitioner's reliance on this Court's decision in Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 68 S.Ct. 140 (1947), is entirely misplaced. The decision in Lillie stands for the proposition that the fact that the plaintiff's injury was sustained as the result of criminal conduct by a third party did not alone deprive the plaintiff of a cause of action against the defendant. Put another way, the decision in Lillie holds that a defendant may be liable to a plaintiff for injuries sustained as a result of criminal activity of another if the facts alleged would permit a finding that the defendant was negligent and that the defendant's negligence was a cause of the plaintiff's injuries. The decision in

Lillie certainly does not stand for the proposition that, at trial, a plaintiff in a criminal activity case is relieved of the requirement that sufficient evidence on cause-in-fact be presented before the plaintiff is entitled to go to the jury.

4. In sum, the Fourth Circuit carefully and independently reviewed the record in this case (as did the trial judge) and determined, on the specific facts of this case, that the plaintiff failed to present sufficient evidence to permit a jury to draw a reasonable inference that the alleged negligence of the respondents was a "but for" or "substantial factor" cause-in-fact of the plaintiff's injuries. This holding was quite proper under the identical standards for determining the sufficiency of evidence utilized by both

the Fourth Circuit and the North Carolina state courts. No occasion is presented for this Court to further review this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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AFFIDAVIT OF FILING AND MAILING

I, Barbara E. Grove, being first duly sworn, deposes and says: On February 2, 1988, I filed with the Clerk's Office of the Supreme Court of the United States for the foregoing Petition for a Writ of Certiorari and Appendix to and further certify that I mailed this same date the required three copies via first-class mail to the opposing counsel listed below:

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TO WIT:

This day personally appeared before me, a notary public in and for the aforesaid jurisdiction, Barbara E. Grove, who made oath that the statements contained herein are true and accurate to the best of her information, knowledge and belief.

Given under my hand this 2nd day of February, 1988.

My Commission expires: June 9, 1991.

Notary

No. 87-1149

Supreme Court, U.S.
FILED
FEB 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

October Term, 1987

LAURA REAGIN,

Petitioner

v.

CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a/ Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

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LAURA REAGIN,
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CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually, and d/b/a Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,
Respondents

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

I. RESPONDENTS INCORRECTLY ARGUE THAT THE STATE STANDARD OF EVIDENTIARY SUFFICIENCY IS THE SAME AS THE FEDERAL STANDARD AS APPLIED HERE.

Respondents concede that a conflict in the circuits exists as to whether state or federal law governs the decision as to the sufficiency of the evidence to support a jury verdict in diversity cases. Brief for Respondents in Opposition, p. 18 (hereinafter Respondents' Brief). Respondents' only argument in opposition to this as a ground for the grant of certiorari is their contention that the result would be the same whether federal or North Carolina law is applied. Assuming, as respondents contend, that the Court below properly applied the federal standard, respondents are manifestly incorrect that North Carolina law would mandate the same result.

Respondents quote from a recent decision by the North Carolina Court of Appeals, an intermediate court, which, say respondents, uses the federal standard in defining proximate cause. White v. Hunsinger, 363 S.E.2d 203 (N.C.App. 1988).

Respondents are apparently impressed by the use of the word "probable"[1] in Hunsinger in contrast to what Hunsinger called a "remote possibility." But respondents fail to recognize that in North Carolina unless there is no evidence from which an inference of proximate cause can be

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[1]The Court of Appeals held the jury's finding on proximate cause not "reasonably probable," (A 55), a phrase frequently used in the circuit courts of appeal. But cf., Galloway v. United States, 319 U.S. 372, 87 L.Ed. 1458, 63 S.Ct. 1077 (1942), discussed infra, p. 17, where this Court specifically disapproved the wholesale framing of standards even under federal law and said the inferences to support a verdict must only be "reasonably possible" if there are probative facts in support.

drawn, the question of what inference is probable or possible or permissible under any general standard must be left to the jury. See Millikan v. Guilford Mills, Inc., 70 N.C.App. 705, 320 S.E.2d 909 (1984) disc. rev. den. 312 N.C. 798, 325 S.E.2d 631 (1985) ("close cases, dubious cases, questionable cases, and even weak cases are still for the jury" on proximate cause). This is made imminently clear by the language from Hunsinger that plaintiff lost because he had not provided any evidence showing that plaintiff would not have died had he been referred earlier to a neurosurgeon.

Note that in Hunsinger the Court of Appeals limited its discussion to malpractice cases. Since plaintiff's case in Hunsinger depended entirely upon expert testimony it necessarily

failed because the expert testimony was insufficient. Every case relied on by respondents on the question of evidentiary sufficiency was involved with whether or not the expert testimony offered was sufficient. See Respondents' Brief, p. 22.

By contrast, although petitioner here offered what amounted to expert testimony on appropriate standards of care, this case did not require expert testimony, either on the standard of care or on proximate causation, and neither court below held that it did. The jurors were perfectly capable, in the use of their common judgment and experience, to decide whether the conduct of the respondents was reasonable and whether it caused injury. In this situation the North Carolina Supreme Court has emphasized again and again the

following from Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687, 690 (1963):

> When more than one legitimate inference can be drawn from the evidence, the question of proximate cause is to be determined by the jury. ... "It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case." (Emphasis supplied.) Conley v. Pearce-Young-Angel Co., 224 N.C. 211, 29 S.E.2d 740.

A 1987 North Carolina Supreme Court case makes clear that the law of North Carolina would have afforded this petitioner the recovery she earned before the jury. In Taylor v. Walker, 320 N.C. 729, 360 S.E.2d 796 (1987), the plaintiff was injured by a shot as he left a rowdy bar--the shot came from the bar--following an altercation in which he struck the first blow, and where he had remained for some time

after it was obvious that trouble was brewing. Both the trial court and the intermediate appellate court had granted JNOV for defendant on grounds that plaintiff was contributorily negligent in remaining in the bar and striking a patron, but North Carolina's highest court reversed, stating:

> The issue, after all, is not whether Taylor chose the best or wisest alternative in remaining in the bar that night and in eventually becoming involved in the altercation with the drunken and belligerent Bear Suits. He most certainly did not. The true issue is whether there is evidence that, if believed, would support an inference that he acted reasonably under admittedly difficult circumstances. We think there is and we so hold. 360 S.E.2d at 800. (Emphasis supplied.)

As to proximate cause, the Supreme Court said:

> As to proximate cause, there was no direct evidence whatsoever that the shot which struck plaintiff was fired by either Bear Suits or any of his friends. Any such

> conclusion is mere speculation. These issues, and their resolution, were better left to the jury, and the trial court therefore erred in allowing defendants' motion for judgment notwithstanding the verdict. 360 S.E.2d at 800.

The rationale for its decision in Taylor v. Walker was stated by the North Carolina Supreme Court as follows:

> Ordinarily, such a judgment [JNOV] is not proper unless it appears as a matter of law that a recovery simply cannot be had by plaintiff upon any view of the facts which the evidence reasonably tends to establish. ...
>
> The heavy burden carried by the movant is particularly significant in cases, such as the one before us, in which the principal issues are negligence and contributory negligence. Only in exceptional cases is it proper to enter a directed verdict or a judgment notwithstanding the verdict against a plaintiff in a negligence case. ... Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent

> man test, or any other applicable standard of care, is generally for the jury. (Citations omitted.) 360 S.E.2d at 799.

The negligence of respondents here in failing to maintain safe premises--which negligence was conceded expressly or by implication by both courts below--cannot rationally be said to promote only one inference as to causation when: (a) the station, in an isolated location, was staffed by only one partially paralyzed attendant, who kept $500 to $600 unprotected on the premises; (b) the rapist used a pistol carried by the station attendant negligently and in violation of North Carolina law to accomplish the rape; (c) the rapist made no move to commit any crime and hid in the restroom while a second person was on the premises; (d) the rapist violated petitioner in an area of the station which, if the

attendant himself is to be believed, was so dark that he could not tell whether petitioner was male or female from 75 to 100 feet away; (e) the station attendant allowed the rapist to loiter on the premises for upwards of an hour before the attack; (f) the station attendant--while drinking coffee--allowed the rapist to get behind him and take from him the pistol which he used in the rape of the petitioner; (g) respondents led petitioner into the trap in the first place by negligently blocking their windows so that she could not see what was going on as she approached the station or after she exited the restroom; and (h) after the rape began the station attendant did nothing to call for help even though a safe telephone was close by in another service station.

Space does not permit us to comment on the inaccuracy of the version of the facts as stated by Respondents' Brief. There is no necessity to do so, for even under respondents' version petitioner was entitled to recover under North Carolina law. The fact petitioner was injured by a criminal act is irrelevant, as respondents ought to concede, because if the criminal act was foreseeable, respondents had a duty to guard against it. Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 68 S.Ct. 140 (1947); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 201 S.E.2d 36, 40 (1981). Foreseeability here is conceded by both lower courts.[2]

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[2]To hold, as the District Court did, that because the rapist, who did not testify by deposition or appear at trial, had a criminal record no reasonable security measures would have deterred or prevented the attack is

All courts agree that on a motion for JNOV the facts must be viewed in the light most favorable to the plaintiff. In Millikan v. Guilford Mills, Inc., 70 N.C.App. 705, 320 S.E.2d 909 (1984), disc. rev. den. 312 N.C. 798, 325 S.E.2d 631 (1985), the North Carolina Court of Appeals said:

> Rarely is it proper to direct a verdict against a plaintiff in a negligence case. ... This is because of the favorable view that must be taken of the plaintiff's evidence in such cases, the prerogative that juries have in all cases to believe all, none, or some of the evidence presented to them, and what is reasonably prudent conduct under varying circumstances is nearly always a question of fact, rather than law. Thus, to survive a motion for directed verdict in such a case, the plaintiff's evidence tending to show a defendant's negligence does not have to be either strong, convincing, consistent, or even credible to anyone except the jury; it is enough if the evidence favorable to plaintiff, when pieced

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such an obvious invasion of the jury's province as to need no discussion.

> together, is sufficient, along with the inferences reasonably drawable therefrom, to warrant finding that plaintiff was injured as a proximate result of the defendant's negligence. Thus, under our law, close cases, dubious cases, questionable cases, and even weak cases are still cases for the jury.... (Emphasis supplied.)

Manifestly, petitioner would not have been denied her recovery under North Carolina law. Undoubtedly both the District Court and the Court of Appeals recognized this, as each was careful to state that the case was being decided under federal law. The record in this case presents a classic conflict between federal law, as applied below, and state law and provides this Court a much needed opportunity to resolve the conflict in the circuits as to which law applies, and to decide the question specifically left open in Dick v. New York Life Ins.

Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959).

II. RESPONDENTS ARE INCORRECT IN STATING THAT THERE IS NO CONFLICT IN THE FEDERAL COURTS AS TO WHEN THE EVIDENCE IS SUFFICIENT TO SUPPORT A JURY VERDICT.

Respondents contend that no conflict exists in the circuits which would be determinative of the outcome in this case. Respondents' Brief, p. 14. Not only does a conflict exist in the circuits which would be determinative--a conflict exists with decisions of this Court which would be determinative. As discussed in petitioner's opening brief on Petition for Certiorari, pp. 45-53, many cases in this Court would mandate a different result here. In fact, North Carolina law and federal law as declared in Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916

(1947), are the same. The Lavender Court said:

> Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.

This case, applying federal standards, can stand scrutiny only if Lavender, Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 68 S.Ct. 140 (1947), and other FELA cases do not apply, a question this Court has never decided. See also the other non-FELA cases cited in Petitioner's opening brief on Petition for Certiorari, pp. 45-53, as well as Galloway v. United States, discussed infra.

And in diversity cases involving similar fact situations to the one at bar other highly respected courts of appeal have differed sharply with the courts below. Some of these cases are cited at page 52 of Petitioner's

opening brief on Petition for Certiorari and need not be repeated here. There can be no doubt that those cases, Doyle (2d Circuit), Kenny (3d Circuit), and Boles (5th Circuit), are highly inconsistent both in reasoning and result with this case, making this case clearly certworthy on the circuit conflict alone. Compare also the excellent discussion in Banks v. Hyatt Corp., 722 F.2d 214, reh. den. 731 F.2d 888 (5th Cir. 1984) (JNOV reversed where patron shot by criminal outside of hotel).

The sole citation by the Court of Appeals in support of its finding as to the lack of proximate cause was to an age discrimination case involving the question whether an employee had been discharged because of his age. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982),

where the Fourth Circuit discussed at length its "reasonable probability" or "substantial probability" standard. Clearly, an age discrimination case presents different questions of proof than does a negligence case, as the North Carolina courts have expressly recognized. Please see the quoted language from Taylor v. Walker, supra, and Millikan v. Guilford Mills, supra. Also it is significant that none of the cases cited by Respondents' Brief, p. 20, for the appropriate federal standard were negligence cases involving a jury's application of the prudent man standard. The Fitzgerald case cited by respondents was a medical malpractice case, the Owens, Ralston Purina and Ford Motor Co. cases were product liability cases involving expert testimony, and the Lovelace case, as indicated, was an Age

Discrimination in Employment Act case, the sole case relied on by the Court of Appeals.

This Court has recognized that the standards for adequacy of evidence to go to a jury may vary from case to case. In Galloway v. United States, 319 U.S. 372, 87 L.Ed. 1458, 63 S.Ct. 1077 (1942), noteworthy also because it was a ruling by this Court in a non-FELA setting, this Court recognized that no one standard may be formulated for all types of cases. The Court said:

> Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon "substantial evidence" rather

> than "some evidence" or "any evidence," or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from "the rules of the common law" which the Amendment requires to be followed. If there is abuse in this respect, the obvious remedy is by correction on appellate review. (Emphasis supplied.) 319 U.S. at 395, 87 L.Ed. at 1473, 63 S.Ct. 1099.

III. CONCLUSION

Over 60,000 diversity cases are filed each year. There is no doubt that the circuits are confused and divided over whether state or federal law as to evidentiary sufficiency

applies. The courts below explicitly deemed themselves to be applying federal law and reached a result contrary to the law of North Carolina. This case presents this Court an opportunity to clarify the law, bring consistency to the lower court rulings, and avoid the forum shopping which Erie R.R. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938) sought to avoid.

If this Court should decide that federal law applies, this case presents an opportunity for the Court to clarify the relationship between its decisions in FELA cases and in diversity cases, to resolve the inconsistency between this case and the cases decided in the Second, Third, Fifth and other circuits, and to rule on the practice by the courts below in purportedly applying the same standard to all types

of cases. In so doing, the Court will decide Seventh Amendment questions of far-reaching significance.

Respectfully submitted,

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AFFIDAVIT OF FILING AND MAILING

I, Barbara E. Grove, being first duly sworn, deposes and says: On February 10, 1988, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petitioner's Reply to Brief for the Respondents in Opposition via Federal Express and further certify that on February 9, 1988 I mailed the required three copies via first-class mail to the opposing counsel listed below:

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TO WIT:

This day personally appeared before me, a notary public in and for the aforesaid jurisdiction, Barbara E. Grove, who made oath that the statements contained herein are true and accurate to the best of her information, knowledge and belief.

Given under my hand this 9th day of February, 1988

My Commission expires: June 9, 1991.

Notary